[Cite as *State v. Hundley*, 2023-Ohio-2571.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LANCE HUNDLEY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0045

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2015 CR 1132

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Chief, Criminal Division, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. John P. Laczko, City Center One, Suite 975, 100 East Federal Street, Youngstown, Ohio 44503 and *Atty. Rhys B. Cartwright-Jones*, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: July 26, 2023

D'Apolito, P.J.

{¶1} Appellant, Lance Hundley, appeals from the February 2, 2022 judgment of the Mahoning County Court of Common Pleas dismissing his untimely petition for postconviction relief without a hearing. On appeal, Hundley asserts the trial court erred in dismissing his petition because there were significant issues of merit to support postconviction relief under R.C. 2953.21 and 2953.23(A)(1). Hundley also argues the court erred in failing to make findings of fact and conclusions of law under R.C. 2953.21(H). Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} On November 6, 2015, Hundley murdered Erika Huff and attempted to murder her mother, Mrs. Denise Johnson. After a trial, a Mahoning County jury convicted Hundley of aggravated murder with a course-of-conduct specification, attempted murder, felonious assault, and two counts of aggravated arson. Following the jury's recommendation, the trial court sentenced Hundley to death on the aggravated-murder count.

{¶3} The Supreme Court of Ohio set forth the facts and procedural history underlying this matter in Hundley's direct appeal of right, affirming his convictions and sentence of death, *State v. Hundley*, 162 Ohio St.3d 509, 2020-Ohio-3775:

> I. BACKGROUND
>
> A. Hundley moves in with Huff
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> Huff lived at 44 Cleveland Street in Youngstown, Ohio. She had a progressive form of multiple sclerosis and could no longer walk. She was entirely dependent on a wheelchair, and a Hoyer lift was used to transfer her from her bed to the wheelchair. Huff received daily care and assistance from nurse aides employed by Comfort Keepers. The nurse aides would assist Huff with daily chores such as cooking and cleaning, getting in and out of bed, and getting dressed and undressed. Huff also wore a medical-

alert necklace that was monitored by Guardian Medical. If the alert was activated, Guardian would call Huff's mother, Mrs. Johnson. An ambulance would also be dispatched to the address provided by Guardian.

Huff's house was one story with an attached garage. The front door was in the center of the house and opened into the front room. To the left of the door was a living area and to the right, a dining area. The dining area contained a large oval table. A hallway from the front room led to the back of the house. The kitchen was behind the dining area, with an entrance off the right side of the hallway. At the end of the kitchen, opposite the entrance, was a door that led to the attached garage. Continuing down the hallway, at the end on the left, was Huff's bedroom. And to the right, across from Huff's bedroom, was a spare room in which the back door was located.

In the summer of 2015, Hundley moved from Washington, D.C., to Youngstown. Huff, who had a daughter with Hundley's brother, offered him a room in her house sometime in the fall. According to Mrs. Johnson, Hundley had been living in Huff's house for approximately three to four weeks by early November. Mrs. Johnson was asked by the prosecutor whether the relationship between Huff and Hundley had become strained; however, the court sustained an objection to the question. The prosecutor then asked Mrs. Johnson whether Huff and Hundley were getting along. She testified that they got along but that their relationship was strained.

According to A'Shawntay Heard, a nurse aide who had cared for Huff for years, Huff's demeanor changed after Hundley moved in, especially when he was around. Heard testified that Hundley was a controlling person and Huff would hold "a lot of stuff in" and not be as open as she had previously been. When Hundley would leave the house, Huff would say things to Heard, including that "she was just fed up with everything." Heard testified that she felt very uncomfortable when Hundley was at the house. She also said that Huff had lost caregivers because of Hundley.

B. Events of November 5 and 6, 2015

1. Huff's medical alert

Heard was on duty at Huff's house on November 5, 2015. She worked a four-hour shift that ended at 10:00 or 11:00 p.m. Heard testified that she completed the typical evening-shift tasks and helped Huff get into bed. She made sure that Huff had access to her cell phone, snacks, and a grabbing aid. At Huff's request, Heard tucked the cash Huff had received from her monthly disability check underneath her thighs, between the bedsheet and Huff's body. Heard testified that the grabbing aid was not bent when she left the house that evening.

According to Heard, Hundley was in and out of the house all evening. She testified, "I was in the kitchen cooking for (Huff) (* * *) (and) he was (* * *) making me feel uncomfortable, coming towards me. I had asked him please back away from me. And he did back away from me once I asked him. Like, he's trying to just hit on me." Hundley told Heard that he "needed some type of mental help and he wasn't from the area." Heard gave him the name of a local counseling center.

Just before she left the house, Heard gave Huff her personal cell-phone number. This was against company policy, but Heard said that she gave Huff her number because Heard "had felt that whole day (that) something just wasn't right or something was going to happen." She felt uncomfortable because Hundley "was in the home (* * *) that night and he was drinking." When Heard left, Hundley was not there.

At 2:01 a.m. on November 6, Huff's medical-alert necklace was activated and an ambulance was dispatched to 44 Cleveland Street. Brittany Koch and her partner, licensed emergency medical technicians ("EMTs"), received a dispatch for an "unknown medical alarm." Koch testified that they received an address but no further information, such as a name, gender, or

age. When they arrived at 44 Cleveland Street, they noted that there was one light-colored car in the driveway and the lights were on behind the drawn blinds; they knocked on the front door and identified themselves. Initially nobody responded, so the EMTs knocked on doors and windows. Still receiving no response, Koch attempted to open the front door, but it was locked.

The EMTs had been at the house a couple of minutes and were preparing to check the back of the house when a tall African-American man—who was later identified by Koch as Hundley—opened the front door. Koch testified that the man was wearing a red hat and a dark hooded sweatshirt. The man told her that he had accidentally triggered the medical alarm and nothing was wrong. Under the belief that the man was the patient, Koch and her partner told him to call back if he needed help. According to Koch, the man was calm and polite and did not seem anxious.

2. Hundley attacks Mrs. Johnson

Shortly after the activation of Huff's medical alert, Guardian called Mrs. Johnson. Mrs. Johnson testified that she got to Huff's house no more than ten minutes after receiving the call. Mrs. Johnson parked in the driveway behind a white car that she did not recognize. She also stated that she did not see an ambulance. As she unlocked the front door, she noted that the top lock was locked, which was unusual because it was the practice of the nurse aides to lock only the bottom lock.

Mrs. Johnson entered the house and found Hundley standing inside with a gasoline can. She smelled gas, and when she asked Hundley where Huff was, he said that she was in the back. Mrs. Johnson told Hundley that she was there to check on Huff and to let first responders in because the medical-alert necklace had been activated. Hundley told Mrs. Johnson that the first responders had already gone. Mrs. Johnson then picked up the

gasoline can, which Hundley had set on the floor, and took it to the attached garage through the door in the kitchen.

When Mrs. Johnson reentered the kitchen, Hundley attacked her. Hundley pinned Mrs. Johnson between the refrigerator and the door to the garage and began to hit her on the head with a hammer. Mrs. Johnson testified that during the attack, Hundley told her he had killed Huff and would also kill her and Huff's brother. When Mrs. Johnson asked why, Hundley told her that Huff "wanted to have sex with (him) and she was disrespecting (his) brother." Hundley also expressed to Mrs. Johnson his belief that Huff and her family just "weren't into him." At one point, Mrs. Johnson told Hundley to stop and reached for him, but Hundley admonished her to not "touch (him) with those bloody hands and get (his) white $150 shirt all dirty." Mrs. Johnson testified that the shirt was white, and it had "some kind of emblem on it or something."

Hundley continued to beat Mrs. Johnson with the hammer. But he then grabbed a kitchen knife and held it to Mrs. Johnson's face while choking her and dragging her through the house. Mrs. Johnson lost consciousness.

When Mrs. Johnson regained consciousness, she was lying on the floor of Huff's bedroom next to her daughter. Mrs. Johnson saw flames burning at her feet and around Huff's body. Mrs. Johnson sat up and tried to brush the fire away from her feet and from Huff. But Hundley saw Mrs. Johnson moving around, so he returned to the bedroom, took Huff's grabbing aid, and tried to hit Mrs. Johnson with it to force her to stay down. Mrs. Johnson was able to take the tool away from Hundley, who then retrieved some alcohol and splashed it on her face. Not knowing where Hundley had gone, Mrs. Johnson crawled to a window. As the room filled with smoke, Mrs. Johnson attempted to escape through the window by dislodging an air-conditioning unit.

3. Rescue of Mrs. Johnson and discovery of Huff's body

Mrs. Johnson's husband, Lonnie Johnson, was concerned when Mrs. Johnson did not return from Huff's home. He drove to Huff's house and was surprised to find the front door was locked because it was never locked. He heard a "wrestling" noise coming from inside the house and thought he heard Mrs. Johnson say something like "get out of here." At 2:56 a.m., Mr. Johnson called 9-1-1.

Youngstown Police Officers Michael David Medvec Jr. and Ken Bielik arrived at the scene at 3:06 a.m. They spoke to Mr. Johnson and then walked around the perimeter of the house twice looking for signs of a burglary. They found no signs of illegal entry. As the officers were about to unlock the front door (using Mr. Johnson's key), the officers heard a "scuffling noise (* * *) like something (was) being pulled towards the back of the house." They immediately ran to the back.

A third Youngstown police officer, Timothy Edwards, joined Officers Medvec and Bielik. As the three officers reached the back of the house, they heard "the air conditioner being rattled" and then realized that the room was on fire. They heard pounding on the window and screams for help. Once they had pulled Mrs. Johnson to safety, Officer Medvec could see into the bedroom and noticed a body, partially clothed, lying on the floor and on fire. He testified that the person appeared to be dead.

Officer Edwards saw the back door open and a taller black male with a bald head look around. According to Officer Edwards, upon seeing the officers, the man "immediately closed the door and stepped back inside." Officer Medvec also testified that he "saw a hand, what was clearly a man's hand, pull the door back shut."

Officers Medvec and Edwards entered the house three times, but twice had to retreat because of heavy smoke. Officer Medvec testified that there was

no evidence of a break-in or burglary. They found Huff's body face up on her bedroom floor. The body was clothed only in underwear, a gasoline-soaked shirt, and socks.

The third time the officers entered the house, they went through the front door and found Hundley. He was lying on the floor, by his gym bag, in close proximity to the front door, halfway underneath the dining-room table. Officer Medvec testified that neither officer had seen him or anyone else the two previous times they had entered the house. When he was taken out of the house, Hundley was motionless but uninjured and free from soot or other debris from the fire. Both Officer Edwards and Detective Sergeant Anthony Vitullo, who arrived on the scene shortly after Officers Medvec, Edwards, and Bielik, testified that they did not observe any injuries or visible marks on Hundley.

After Mrs. Johnson identified her attacker to an investigating officer, Hundley was the sole suspect in Huff's death. Ambulances took Hundley and Mrs. Johnson to St. Elizabeth Youngstown Hospital. Officer Bielik accompanied Hundley to the hospital.

4. Huff's autopsy

Dr. Joseph Ohr, a deputy coroner for Mahoning County, conducted Huff's autopsy. But because Dr. Ohr died before Hundley's trial, Dr. Joseph Felo, the deputy medical examiner for Cuyahoga County, testified as a substitute witness. Dr. Felo reviewed Huff's autopsy report, toxicology report, and medical history and photographs from the scene and the autopsy.

Referring to the autopsy report, Dr. Felo explained that Huff died from "two mechanisms"—blunt trauma of her head, face, chest, and abdomen in conjunction with ligature strangulation—and her death was not instantaneous. Dr. Felo also stated that because there was no sign of

smoke or soot in her nostrils or her airways down to the lungs, the fire began after Huff's death.

Dr. Felo testified that Huff suffered blunt-force trauma while she was still alive, resulting in significant bruising and facial and head lacerations, but that the injuries to her body were not immediately fatal. However, Dr. Felo noted that Huff had been struck with enough force to tear a major vein that supplies or collects blood from the intestines, leading to "massive internal bleeding around the belly." The internal bleeding would have made Huff "shocky and somewhat weaker during her dying process."

The blunt-force trauma contributed to Huff's death, according to Dr. Felo, in conjunction with the strangulation. Dr. Felo noted that there was evidence of petechial hemorrhages on the whites of Huff's eyes, which indicated strangulation. He also noted that a black cord around Huff's neck "was tight enough to leave an impression."

Dr. Felo testified that the bruising from the blunt-force trauma occurred before the strangulation. Additionally, he explained that the amount of blood that had accumulated in Huff's body and the bruising that had developed indicated that "the beating t(ook) a while."

The autopsy revealed many other nonlethal injuries. Huff had been beaten severely on her face and head, resulting in multiple significant bruises and cuts. Her body showed evidence of blunt impacts to the trunk and extremities, including rib fractures, the massive internal bleeding, and bruising and lacerations on the front and back of her upper arms and on her chest. She had several defensive wounds on her forearms and hands.

Dr. Felo also noted areas on Huff's body where her skin had sloughed off or slipped away as a result of gasoline being poured on her body. He also pointed out an area of brown discoloration on Huff's side, which he said was indicative of a "thermal injury from her body being set on fire after she died."

He also noted that there was "some charring of the skin." Dr. Felo testified, to a reasonable degree of medical certainty, that Huff was already dead when the fire occurred.

5. Mrs. Johnson's injuries

Mrs. Johnson arrived at St. Elizabeth's emergency room at 3:38 a.m. on November 6. Cortney Birchak, a registered nurse who treated Mrs. Johnson later in the morning, testified that Mrs. Johnson had "sustained significant (* * *) multiple head injuries from a hammer." Birchak saw multiple lacerations and areas of stapling and bruising on Mrs. Johnson's face. There was swelling on her face. According to Birchak, Mrs. Johnson was in such severe pain that Birchak could not completely clean the dried blood off Mrs. Johnson's face and hands. Mrs. Johnson's hospital records indicate that she also suffered a concussion with loss of consciousness and a fracture to her left hand.

6. Hundley's arrest

Detective Sergeant Ronald Rodway of the Youngstown police department arrived at the crime scene after Hundley and Mrs. Johnson had been taken to the hospital. Detective Rodway walked through the house and then spoke to fire-department personnel and arson investigators. Next, Detective Rodway and his partner went to the hospital hoping to talk to Mrs. Johnson.

When Detective Rodway arrived at the hospital, EMT Koch was in the emergency room on another emergency call. Rodway asked EMT Koch if she recognized the patient in one of the trauma bays. EMT Koch said yes and confirmed that he was the man who had opened the door at the house at 44 Cleveland Street on the EMTs' earlier run to that address.

Detective Rodway eventually spoke with Mrs. Johnson, who identified Hundley as her attacker. Hundley was discharged from the hospital into police custody around 2:00 p.m. on November 6, 2015. He initially waived

his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and voluntarily talked to detectives. At the start of the interview, Hundley was focused on papers in front of him, and detectives had to ask him to put the documents aside while they spoke. Before the detectives asked any questions about Huff's death and the attack on Mrs. Johnson, Hundley asked, "What do you all think is going on?"

Hundley told investigators that he had known Huff for approximately eight years, that they had a good relationship, and that he had been living at Huff's house for about a month. Hundley also said that he was in and out of the house on the night of November 5. He said that he had been at the Southern Tavern and acknowledged that he had had one shot of Ciroc and a beer but denied that he had been intoxicated. When asked whether Huff was awake or sleeping when Hundley returned from the bar, Hundley said, "(T)his here is where it gets tricky."

At this point, Hundley asked the detectives whether he was under arrest (they said yes) and then said that he had "kind of figured out something from police officers. Erika died?" Hundley then invoked his right to counsel. However, Hundley volunteered that he had been "choked out" by a stranger who broke into Huff's house early on the morning of November 6. Then, after the investigators confirmed he wanted counsel, Hundley said: "That's it. You all (are) detectives, you all do your jobs. (* * *) I'm arrested for murder apparently."

C. Evidentiary analysis

1. DNA testing

The Ohio Bureau of Criminal Investigation ("BCI") received DNA standards from Huff, Mrs. Johnson, and Hundley, and a forensic scientist took cuttings from each swab for testing against evidence obtained from the crime scene.

BCI conducted DNA testing on swabs from the claw, the head, and the handle of the hammer used to attack Mrs. Johnson. The hammer handle contained a mixture of DNA contributions, with Mrs. Johnson as a major contributor. The claw and head also contained Mrs. Johnson's DNA profile. BCI forensic scientist David Miller explained to the jury that an item containing a large amount of one person's DNA may also contain a small amount of another person's DNA, which might be drowned out by the larger contribution. Further Y-STR testing (which looks only at the Y chromosome along a DNA strand) on the hammer's handle revealed some male DNA, but there was not a sufficient amount of DNA for comparison.

BCI also tested blood samples from the handle of Huff's grabbing aid, which was bent when it was collected from the house. The handle yielded a Y-STR profile consistent with Hundley, with a frequency of 1 in 621 unrelated males. The grab end and the black discs at the grab end each yielded a single profile that was consistent with Mrs. Johnson. The frequency of the profile was 1 in 1 sextillion 282 quintillion for all three locations.

BCI also tested the bloody white Hilfiger polo shirt that Hundley had been wearing. The polo shirt had "YACHT CLUB New York" on the front upper-right side and a large crest with HILFIGER underneath the crest on the front upper-left side. The polo shirt was found in Hundley's gym bag in the dining area near the front door of the house.

The inside collar of the polo shirt yielded a mixture of profiles, and BCI could not exclude Hundley or Mrs. Johnson as possible contributors. The statistic for that mixture of profiles was 1 in 4,307,000. Assuming random testing, this result means that BCI would have to test "around 4 million people before (it) would find someone who could (* * *) fit into that mixture of DNA profiles." Two other stains on Hundley's polo shirt contained a profile consistent with Mrs. Johnson, to an expected frequency of 1 in 1 sextillion 282 quintillion.

DNA testing of Huff's fingernail clippings yielded a mixture of profiles including Huff's and Hundley's. STR testing, another form of DNA testing, found a profile consistent with Hundley to an expected frequency of 1 in 300,000, and Y-STR testing confirmed that he was a contributor.

2. Arson investigation

Brian Peterman, an investigator from the State Fire Marshal's office, examined 44 Cleveland Street on November 6, 2015. He arrived shortly after 6:00 a.m. Peterman found minimal damage outside the house, mainly minor smoke staining around the window from which the air-conditioning unit had been removed. A strong odor of gasoline was still present when he entered the house. After examining the inside of the house, Peterman concluded that the fire had originated in Huff's bedroom. He found an irregular burn pattern that began on Huff's bed and "continued down from the bed onto the floor in an irregular shape."

While sorting through the fire debris, fire investigators collected a metal knife blade, clothing, a cigarette lighter, a swatch of carpet from the floor near Huff's bed, and other debris. Peterman also collected a gasoline can that he found in the garage. The coroner's office provided Peterman with the t-shirt that Huff had been wearing, and Youngstown police also provided him with the other clothes taken from the house, which included Hundley's white Hilfiger polo shirt and white t-shirt.

Christa Rajendram, Ph.D., the forensic-laboratory supervisor at the State Fire Marshal's office, identified 13 items that were tested, including items that Peterman had collected from the house and items collected by the coroner and the police. Dr. Rajendram testified that to a reasonable degree of scientific certainty, gasoline was detected on every item. Hundley's white Hilfiger polo shirt and white t-shirt also tested positive for chloroform.

D. Defense case

The defense presented testimony from two witnesses. Hundley testified that Huff had been his brother's former girlfriend and he had known her for about eight years. Hundley stated that after moving to Youngstown from Washington, D.C., he had initially lived with his brother. However, that living arrangement became crowded, and Hundley asked Huff whether he could stay with her.

Hundley testified that Huff was in a wheelchair and that he had been in her bedroom a couple of times when the nurse aide used the Hoyer lift to move Huff. Hundley explained that a Hoyer lift is used to transfer a person who is paralyzed or unable to move from a bed to a wheelchair or stretcher.

Hundley then testified to the events of November 5, 2015. He said he returned to Huff's house around 8:00 p.m. after being at his cousin's house and stopping at a nearby convenience store to buy two 24-ounce beers. According to Hundley, he and Huff chatted until around 9:00 or 9:30 p.m., when Heard put Huff to bed. He smoked a "blunt of marijuana" with Huff before she went to bed. Around 9:30 or 10:00 p.m., Hundley went to a nearby bar until 11:00 or 11:30 p.m., when he returned to Huff's house. Hundley testified that when he returned, Huff was still awake so he went into her room and talked for a while.

Hundley claimed he then went to the living room and fell asleep on the couch. He testified that the next thing he remembered "was being woke up with somebody strangling (him) out from behind." He said that he blacked out and woke up on the kitchen floor. Hundley got up and walked toward the back of the house, by Huff's bedroom. Hundley testified that at that point, he saw a dark-skinned, African-American male about Hundley's height leave Huff's bedroom carrying a gas can.

Hundley checked on Huff only to find that she was on fire; he was not sure whether she had a pulse. At that point, Mrs. Johnson entered the front door. Before he realized who was at the door, Hundley grabbed the hammer from a kitchen drawer. Hundley said that he had a knife in his other hand, but that he dropped both the hammer and knife on a table when he saw Mrs. Johnson. According to Hundley, he saw Mr. Johnson's truck parked behind Mrs. Johnson's car in the driveway and the intruder was sitting in the truck's passenger seat. Hundley testified that Mrs. Johnson had a gas can in her hand and that she told him, "Lance, it's not too late. We can come up with something to tell the police." Mrs. Johnson tried to get Hundley to sit on the couch, but he began to hit her with the hammer because he "didn't know what she was going to do from that point." In the struggle, Mrs. Johnson and Hundley ended up on the floor of Huff's room until Hundley kicked her to get away.

Hundley decided to leave through the back door. But when he saw Mr. Johnson and two other individuals that he did not recognize, he quickly closed and locked the back door. Hundley testified that he then changed out of the white Hilfiger polo shirt and t-shirt he was wearing and put them in his gym bag, which he dropped on the dining room floor. The next thing he remembered was waking up after having passed out. Hundley said he also passed out in the ambulance.

On cross-examination, Hundley denied answering the door to Koch around 2:00 a.m. Hundley testified that he had never seen Koch until she testified at his trial and that the man she described was the same person that he had just described as having seen. He also admitted that he did not give the police the details of his version of events, including his claim that Mr. and Mrs. Johnson conspired to murder Huff.

The defense also introduced expert testimony from Dr. Alfred Elsworth Staubus, an emeritus faculty member at the Ohio State University College

of Pharmacy, to suggest that someone used chloroform to incapacitate Hundley on November 6. Dr. Staubus testified about "the use of chloroform to temporarily incapacitate a person." He explained that although Hundley's toxicology report from November 6 did not note the presence of chloroform, hospitals do not test for it. He also noted that Hundley's blood-alcohol level was .105, which is above the legal limit for driving, which is .080. According to Dr. Staubus, .105 is not a particularly high blood-alcohol level and would not have rendered Hundley unconscious. Dr. Staubus averred that chloroform begins in liquid state but is so volatile that it immediately vaporizes and emits aerosol fumes. He testified that it would not be inconsistent for chloroform to be present on clothing worn by an individual who had used it or by a person against whom the chloroform was used. Dr. Staubus testified that holding a rag soaked in chloroform over the nose and mouth of a person can cause incapacitation.

II. PROCEDURAL HISTORY AND SENTENCING

A grand jury indicted Hundley on five counts. Count One charged Hundley with aggravated murder with prior calculation and design (R.C. 2903.01(A)), Count Two charged him with attempted murder (R.C. 2903.02/2923.02(A)), Count Three charged him with felonious assault (R.C. 2911.02(A)(1)(d)), and Counts Four and Five charged him with aggravated arson (R.C. 2909.02(A)). The aggravated-murder count included one death-penalty specification under R.C. 2929.04(A)(5), which alleged that Hundley had committed the murder of Huff as part of a course of conduct involving the purposeful killing of or attempt to kill two or more individuals.

Hundley pleaded not guilty to all counts, including the capital specification, and the case was tried before a jury. The court denied his motion for acquittal following the state's case and his renewed request for acquittal before submitting the case to the jury. Within four hours, the jury returned guilty verdicts on all counts and the capital specification.

> The court granted Hundley's oral motion to represent himself for purposes of mitigation, and the mitigation hearing was held on May 30, 2016. The state offered into evidence all the exhibits from the guilt phase, except an exhibit that was a picture of Huff, and then rested. Hundley then rested without presenting any evidence.
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> The jury unanimously recommended a sentence of death as to Count One, and the court accepted the recommendation and imposed a death sentence. As to the noncapital offenses, the court merged Count Two with Count Three, and Count Four with Count Five, and then sentenced Hundley to 11 years' imprisonment for the attempted-murder conviction in Count Two and to a consecutive 11-year prison term for the aggravated-arson conviction in Count Four.

Hundley, 2020-Ohio-3775, ¶ 2-57.

{¶4} Hundley timely appealed as of right to the Supreme Court of Ohio, Case No. 2018-0901. On July 22, 2020, the Supreme Court of Ohio affirmed Hundley's convictions and death sentence. *Id.* at ¶ 154, *cert. denied, Hundley v. Ohio*, 141 S.Ct. 1420, 209 L.Ed.2d 147 (2021).

{¶5} On September 29, 2021, Hundley filed a petition in the Mahoning County Court of Common Pleas for postconviction relief pursuant to R.C. 2953.21 seeking to vacate his convictions on the basis that they are void or voidable under the United States Constitution or the Ohio Constitution. Hundley raised two claims involving ineffective assistance of trial counsel: (1) trial counsel were ineffective for failing to object to the trial court's colloquy, neglecting the elements of *State v. Ashworth,* 85 Ohio St.3d 56 (1999), in allowing Hundley to proceed pro se at mitigation and waive presentation of any mitigation evidence; and (2) trial counsel were ineffective in not securing a continuance to attempt to rehabilitate the attorney-client relationship prior to Hundley proceeding pro se at mitigation. (9/29/2021 Petition for Post-Conviction Relief, p. 13, 18).

{¶6} On January 24, 2022, the State filed a motion for judgment on the pleadings. The State asserted Hundley's petition for postconviction relief was untimely filed (R.C.

2953.21(A)(2)) and failed to satisfy an exception for the delay (R.C. 2953.23(A)(1)). (1/24/2022 State's Motion for Judgment on the Pleadings, p. 1-2, 34). Accordingly, the State maintained the trial court was without jurisdiction to review Hundley's untimely petition. (*Id.* at p. 2). Furthermore, the State claimed Hundley's petition fails substantively because it failed to overcome res judicata to establish a constitutional violation and because he failed to make these arguments in his direct appeal to the Supreme Court of Ohio. (*Id.* at p. 2, 34).

{¶7} On February 2, 2022, the trial court dismissed Hundley's untimely petition for postconviction relief without a hearing.

{¶8} Hundley filed the instant appeal with this court, Case No. 22 MA 0045, and raises two assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY OVERRULING DEFENDANT-APPELLANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT A HEARING WHEN THERE WERE SIGNIFICANT ISSUES OF MERIT TO SUPPORT POST-CONVICTION RELIEF PURSUANT TO R.C. 2953.21 AND R.C. 2953.23(A)(1).

{¶9} In his first assignment of error, Hundley argues the trial court erred in dismissing his petition for postconviction relief without a hearing. Hundley claims there were significant issues of merit to support relief under R.C. 2953.21 and 2953.23(A)(1).

> Post-conviction relief is a collateral civil attack on a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. R.C. 2953.21 through R.C. 2953.23 govern petitions for post-conviction and provide that "any defendant who has been convicted of a criminal offense and who claims to have experienced a denial or infringement of his or her constitutional rights may petition the trial court to vacate or set aside the judgment and sentence." *State v. Martin*, 7th Dist. No. 12 MA 167, 2013-Ohio-2881, ¶ 13.

> We apply an abuse of discretion standard when reviewing a trial court's decision to deny a post-conviction relief petition without a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013-Ohio-2951, ¶ 21.
>
> "(P)ursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun*, 86 Ohio St.3d 279, 291, 1999-Ohio-102, 714 N.E.2d 905. Substantive grounds for relief exist where there was a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable. *State v. Cornwell*, 7th Dist. No. 00-CA-217, 2002-Ohio-5177, ¶ 25.

State v. Smith, 7th Dist. Mahoning No. 17 MA 0041, 2017-Ohio-7770, ¶ 8-10.

{¶10} "A postconviction petition may also be dismissed without a hearing where the claims are barred by res judicata." *State v. West*, 7th Dist. Jefferson No. 07 JE 26, 2009-Ohio-3347, ¶ 24. Res judicata bars any claim or defense that was raised or could have been raised in an earlier proceeding:

> Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.

State v. Perry, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967).

{¶11} A petition for postconviction relief must be filed within the statutorily prescribed time. R.C. 2953.21 states a postconviction petition:

> shall be filed 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 or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court.

R.C. 2953.21(A)(2)(a).

{¶12} R.C. 2953.23 provides an exception to the 365-day requirement. According to R.C. 2953.23(A)(1), a petitioner may file a delayed petition only if both of the following subsections apply:

> (a) Either the 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, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows 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 or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

R.C. 2953.23(A)(1)(a)-(b).

{¶13} In this case, the parties agree and the record establishes the trial transcripts were filed with the Supreme Court of Ohio on December 5, 2018. (1/13/2023 Appellant's Brief, p. 15); (2/2/2023 Appellee's Brief, p. 23). Hundley concedes that "pursuant to R.C.

2953.21(A)(2), [his] Post-Conviction Petition was statutorily due to be filed with the trial court by December 5, 2019." (1/13/2023 Appellant's Brief, p. 15). Hundley did not file his petition for postconviction relief until September 29, 2021, approximately 665 days beyond the 365-day deadline. *See* R.C. 2953.21(A)(2). Thus, Hundley's petition was untimely filed. Therefore, unless Hundley can demonstrate an exception entitling him to relief, his petition is untimely and the trial court was without jurisdiction to consider it. *See* R.C. 2953.23(A)(1)(a)-(b).

{¶14} Contrary to R.C. 2953.21(A)(2)(a), Hundley believes the time should not have begun running in his case from the date on which the trial transcript was filed in the Supreme Court of Ohio. *See* (1/13/2023 Appellant's Brief, p. 17). Hundley stresses that although his petition was untimely filed, "appellate counsel was not provided to [him] at that time for the purpose of postconviction relief." (*Id.* at p. 15-16). On August 13, 2020, Hundley's representatives filed a petition for writ of certiorari and a motion for appointment of counsel for first post-conviction review. In his memorandum in support, Hundley concedes his "post-conviction petition is untimely," but argues "the Court should excuse the untimeliness by finding good cause and by equitable tolling to appoint counsel for first post-conviction review." (8/13/2020 Motion for Appointment of Counsel for First Post-Conviction Review, p. 2-3). On September 29, 2020, the trial court appointed counsel to prosecute Hundley's post-conviction review. There is nothing in that order in regards to a motion for leave to amend pursuant to R.C. 2953.21(G). (9/29/2020 Order).

{¶15} In support of his position both in his memorandum before the trial court and in his brief before this court on appeal, Hundley relies on *State v. Group*, 7th Dist. Mahoning No. 10 MA 21, 2011-Ohio-6422, a capital case involving postconviction relief. (8/13/2020 Motion for Appointment of Counsel for First Post-Conviction Review, p. 4); (1/13/2023 Appellant's Brief, p. 17). However, the procedural facts in the instant matter do not mirror those in *Group.* Although there was a delay in the appointment of counsel for Group's postconviction petition, it was nevertheless *timely* filed on March 30, 1999. ¶ 42. Counsel in that case filed a motion to amend the petition which the trial court ultimately granted in 2009. R.C. 2953.21 controlled at all times in *Group* because the petition was timely filed. Unlike *Group,* Hundley's petition here was untimely filed and there was no attempt made to amend the petition pursuant to R.C. 2953.21(G).

{¶16} Upon review, Hundley fails to demonstrate an exception for the delay under R.C. 2953.23. Hundley does not establish that he was unavoidably prevented from discovery of the facts upon which he bases his claims or that there is a new state or federal right that applies to his situation. *See* R.C. 2953.23(A)(1)(a). Hundley also does not establish by clear and convincing evidence that, but for a constitutional error at trial, no reasonable factfinder would have found him guilty of the offenses of which he was convicted. *See* R.C. 2953.23(A)(1)(b). Thus, Hundley's petition does not meet the exceptions for an untimely petition set forth in R.C. 2953.23, and as a result, the trial court was without jurisdiction to consider the claims raised within.

{¶17} Even assuming arguendo that Hundley's petition was timely filed or that it satisfied R.C. 2953.21 or 2953.23, the petition failed to state substantive grounds for relief. In addition, Hundley's claims could have been raised on direct appeal with the Supreme Court of Ohio. They are, therefore, barred by res judicata. *See Perry, supra,* at 180-181.

{¶18} As stated, Hundley raised two claims involving ineffective assistance of trial counsel in his petition for postconviction relief: (1) trial counsel were ineffective for failing to object to the trial court's colloquy, neglecting the elements of *State v. Ashworth,* in allowing Hundley to proceed pro se at mitigation and waive presentation of any mitigation evidence; and (2) trial counsel were ineffective in not securing a continuance to attempt to rehabilitate the attorney-client relationship prior to Hundley proceeding pro se at mitigation. (9/29/2021 Petition for Post-Conviction Relief, p. 13, 18).

{¶19} Both grounds for relief could and should have been raised in his direct appeal to the Supreme Court of Ohio because they solely rely on what the trial transcripts establish, or do not establish, relative to both arguments. The trial court's colloquy regarding Hundley's right to present mitigation evidence is wholly contained in the record. (5/10/2018 Trial by Jury Tr., p. 2051-2052). The record also contains defense counsel's advice to Hundley that he should not proceed pro se in the mitigation phase and that doing so would likely result in a death sentence. (*Id.* at p. 2038-2039). Hundley did not overcome the res judicata bar as he failed to offer any evidence dehors the record to demonstrate that he could not have made these arguments with information already in the original trial record.

{¶20} Hundley failed to state substantive grounds to support his petition that would clear the res judicata hurdle. Hundley fully understood and intelligently relinquished his right to counsel on two separate occasions, at the suppression hearing and at mitigation. (8/7/2017 Suppression Hearing Tr., p. 195-219); (5/10/2018 Trial by Jury Tr., p. 2044-2050); *Hundley,* 2020-Ohio-3775, ¶ 98-110.

{¶21} Hundley executed a written waiver of his right to trial counsel and the record reflects that he knowingly and intelligently waived this right to counsel at mitigation. During mitigation, trial counsel unequivocally stated that Hundley was "competent" at the time he waived his right to counsel at mitigation. (5/10/2018 Trial by Jury Tr., p. 2042-2043). The trial court sufficiently inquired to determine whether Hundley fully understood and intelligently relinquished his right to counsel in open court. (*Id.* at p. 2044-2050). The court explained to Hundley "the dangers and disadvantages of self-representation" and the possible penalties he faced. (*Id.*) Hundley read and signed the "Waiver of Counsel" form that explained in detail, his Sixth Amendment right to counsel and the inherent dangers of self-representation. (*Id.* at p. 2050).

{¶22} Hundley also seems to suggest that his Sixth Amendment right to the effective assistance of counsel trumps his Sixth Amendment right to self-representation. However, the record is clear that trial counsel correctly stated during mitigation that Hundley's Sixth Amendment "right of self-representation is primary." (*Id.* at p. 2042-2043); *see, e.g., Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Trial counsel was under no obligation to secure a continuance of the mitigation hearing once Hundley indicated his knowing and intelligent desire to waive his right to counsel.

{¶23} "[I]t is well established that there is no constitutional right to standby counsel." *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, ¶ 13. "A defendant who knowingly and intelligently waives his right to representation by counsel and insists on asserting his right to self-representation, may not then assert his own ineffectiveness as an impairment of that right. This is not a novel claim, but one which is foreclosed by *Faretta* itself." *Cooley v. Nix*, 991 F.2d 801, 1993 WL 122093, *2 (8th Cir. 1993).

{¶24} Because Hundley's petition for postconviction relief was untimely filed, no exception entitling him to relief was demonstrated, his claims are barred by principles of

res judicata, and there are additionally no substantive, supporting grounds, the trial court did not abuse its discretion in dismissing his petition without a hearing.

{¶25} Hundley's first assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY OVERRULING DEFENDANT-APPELLANT'S PETITION FOR POST-CONVICTION RELIEF VIOLATING APPELLANT'S DUE PROCESS RIGHTS BY FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO R.C. 2953.21(H).

{¶26} In his second assignment of error, Hundley contends the trial court erred in failing to issue findings of fact and conclusions of law pursuant to R.C. 2953.21(H) when it denied his petition for postconviction relief.

> Pursuant to R.C. 2953.21(H), when a "court does not find grounds for granting" a petition for postconviction relief, "it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition." "The purpose of requiring findings of fact and conclusions of law is to apprise the petitioner of the basis for the court's disposition and to facilitate meaningful appellate review." *State v. Maxwell*, 8th Dist. Cuyahoga No. 107758, 2020-Ohio-3027, ¶ 12. However, a trial court is not required to issue findings of fact and conclusions of law when it dismisses an untimely or successive petition for postconviction relief. *See State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155, ¶ 6; *State ex rel. Carroll v. Corrigan*, 84 Ohio St.3d 529, 530, 705 N.E.2d 1226 (1999).

State v. Porter, 7th Dist. Belmont No. 20 BE 0033, 2021-Ohio-4630, ¶ 12.

{¶27} As addressed, Hundley's petition for postconviction relief was untimely filed, no exception entitling him to relief was demonstrated, his claims are barred by principles of res judicata, and there are additionally no substantive, supporting grounds. Thus, the

trial court was not required to issue findings of fact and conclusions of law when it dismissed Hundley's untimely petition for postconviction relief. *Id.*

{¶28} Nevertheless, the trial court's findings and conclusions were sufficient to satisfy R.C. 2953.21(D). The purpose of requiring findings of fact and conclusions of law is to apprise the petitioner of the basis for the common pleas court's disposition and to facilitate appropriate and meaningful appellate review. *State ex rel. Carrion v. Harris*, 40 Ohio St.3d 19 (1988).

> A trial court need not discuss every issue raised by appellant or engage in an elaborate and lengthy discussion in its findings of fact and conclusions of law. The findings need only be sufficiently comprehensive and pertinent to the issue to form a basis upon which the evidence supports the conclusion. *State v. Clemmons* (1989), 58 Ohio App.3d 45, 46, 568 N.E.2d 705, 706-707, citing 5A Moore, Federal Practice (2 Ed.1990) 52-142, Section 52.06[1].

State v. Calhoun, 86 Ohio St.3d 279, 291-92 (1999).

{¶29} Here, the trial court dismissed Hundley's petition without a hearing specifically stating:

> The Court has reviewed both Motions and the relevant case and statutory law. The Court finds [Hundley's] Petition is filed untimely. The Court notes that an untimely petition for post-conviction relief may be considered if the petitioner was unavoidably prevented from discovering facts which are the bases for his petition or if there is a new retroactive right recognized by the United States Supreme Court. The Court finds that [Hundley] has failed to meet this burden.
>
> Furthermore, the Court recognizes that [Hundley] bears the burden of demonstrating by competent and credible evidence of a constitutional violation and that [Hundley] is not automatically entitled to an evidentiary hearing. The Court finds that there are no substantive grounds for relief.

(2/2/2022 Judgment Entry, p. 1).

{¶30} Thus, the trial court's February 2, 2022 judgment demonstrates the basis for its decision and the findings and conclusions are supported by the evidence. The court's judgment satisfies the requirements under R.C. 2953.21 and 2953.23.

{¶31} Hundley's second assignment of error is without merit.

CONCLUSION

{¶32} For the foregoing reasons, Hundley's assignments of error are not well-taken. The February 2, 2022 judgment of the Mahoning County Court of Common Pleas dismissing Hundley's untimely petition for postconviction relief without a hearing is affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.