

Edwin Blinn sued Rick Kammen and Kammen’s law firm for professional negligence arising out of Kammen’s representation in Blinn’s federal criminal prosecution. The trial court granted summary judgment for Kammen. As Blinn designated no evidence Kammen proximately caused Blinn’s injury, we affirm.¹

FACTS AND PROCEDURAL HISTORY

Blinn retained attorney Shane Beal to represent him in a “proffer session,”² (Appellant’s App. (hereinafter “Blinn App.”) at 102), where Blinn and the government negotiated an agreement for Blinn’s cooperation in an investigation.³ In exchange for Blinn’s “truthful cooperation,” (*id.*), the government would allow Blinn to plead guilty to a misdemeanor. The government agreed Blinn’s statements in the proffer session could not later be used against him if the government filed more serious charges.

At some point, Beal declined to allow the federal agents to interview Blinn about another of Beal’s clients.⁴ The refusal ended “negotiations that would have, at worse [sic],

¹ Kammen moves to dismiss Blinn’s appeal on the ground Blinn did not provide us with certain materials that supported the summary judgment for Kammen. Because we affirm the summary judgment, we deny Kammen’s motion to dismiss.

² Deposition testimony explained “the outline of a proffer session”: “You have the government who has expressed interest in your client’s truthful cooperation. . . . You have a client who is interested in cooperating but who obviously doesn’t want to go in there, be truthful, admit wrongdoing and then basically have his head chopped off as a reward.” (Blinn App. at 102.) “[I]f indeed in being truthful [your client] admits to criminal wrongdoing, the proffer [agreement] will protect him . . . in that nothing he says in that proffer session can be used against him should negotiations collapse.” *Id.*

³ Blinn sued Beal for malpractice. The trial court dismissed the suit, and we affirmed. *Blinn v. Law Firm of Johnson, Beaman, Bratch, Beal & White, LLP*, No. 27A05-1011-CT-721 (Ind. Ct. App. Apr. 29, 2011).

⁴ In his motion to reconsider the admissibility of his proffer statement, Blinn alleged “Government agents came to Shane Beal and asked Beal if [Blinn] would speak to them about Troy Kistler’s possession of 2 pounds of marijuana. Without consulting Blinn, Beal told the Government that [Blinn] would not cooperate any further. Kistler was Beal’s former client.” (Blinn App. at 113.)

landed Mr. Blinn with a federal misdemeanor.”⁵ (*Id.* at 105.) The government then indicted Blinn on a federal felony money laundering charge.

After Blinn’s indictment, he hired Kammen to serve as his lead counsel. Because the proffer agreement had collapsed, the government sought to use Blinn’s statements against him. Kammen opposed those efforts, but for unspecified “strategic reasons,” (Kammen Br. at 3, 14), Kammen declined to call Beal as a witness at an initial hearing on the admissibility of Blinn’s proffer statements. The federal court ruled Blinn’s proffer statements were admissible.

At a subsequent hearing, Kammen asked the court to “revisit the whole proffer issue,” (Kammen App. at 49), and he called Beal to testify. Beal testified at length about his representation of Blinn and about the proffer agreement. The court declined to change its ruling on the admission of the proffer statements.

Ultimately, Blinn was convicted of felony money laundering. Thereafter, he filed a malpractice action against Kammen and his firm. In support thereof, Blinn asserted Kammen, among other things, did not tell him federal investigators made continued requests

⁵ Robert Hammerle, who represented Blinn after Kammen withdrew, placed responsibility for the refusal on Beal and characterized the impact that way. Kammen suggests the refusal was Blinn’s decision: “Blinn breached the terms of the Proffer Agreement by refusing to cooperate with federal government agents.” (Br. of Appellees (hereinafter “Kammen Br.”) at 3.) The page of the Appendix to which Kammen directs us does not directly support that statement. It includes a statement from the judge in the federal proceeding that suggests the judge had previously decided the “plain language of the immunity agreement controlled the issue,” but that Beal and Blinn were now saying, “in essence, I didn’t understand the plain language of that agreement, although both said they read it and carefully discussed it.” (App. of Appellees, Rick Kammen and the Law Firm of Gilroy Kammen and Hill (hereinafter “Kammen App.”) at 135.) The judge found that “denial of understanding . . . not credible.” (*Id.*)

Blinn later sued Hammerle for malpractice. The trial court granted summary judgment for Hammerle, and we affirmed. *Blinn v. Hammerle*, No. 49A02-1006-CT-634 (Ind. Ct. App. Apr. 4, 2011).

to interview him and Kammen did not inform him of conflicts of interest attendant to the involvement of two others in the case. Kammen moved for summary judgment, which the trial court granted.

DISCUSSION AND DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56; *McSwane v. Bloomington Hosp. and Healthcare System*, 916 N.E.2d 906, 909 (Ind. 2009). We construe all facts and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *Id.* Although the non-moving party has the burden of persuading us that the grant of summary judgment was erroneous, we carefully assess the decision to ensure he was not improperly denied his day in court. *Id.* at 909-10. We are not limited to reviewing the trial court's reasons for granting summary judgment, but will affirm a summary judgment if it is sustainable on any theory or basis found in the record. *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1371 (Ind. 1992).

In its summary judgment order, the trial court determined Blinn's malpractice claim was "contrary to public policy,"⁶ (Blinn App. at 32), and Blinn had not provided evidence Kammen's actions were the proximate cause of the Blinn's injury (*i.e.*, his incarceration). We agree that Blinn did not designate evidence Kammen was responsible for Blinn's

⁶ The trial court found Blinn's claims failed under "the sound policy objective" stated in *Rimert v. Mortell*, 680 N.E.2d 867, 872 (Ind. Ct. App. 1997), *trans. denied*, that "those who knowingly and intentionally engage in serious illegal acts should not be able to impose liability upon others for the consequences of their own behavior." As we find Kammen's actions did not cause Blinn's asserted injury, we need not address whether public policy bars a legal malpractice action by someone who agreed to plead guilty.

incarceration.

To prove a legal malpractice claim, the plaintiff-client must show: 1) employment of the attorney (the duty); 2) failure of the attorney to exercise ordinary skill and knowledge (the breach); 3) proximate cause (causation); and 4) loss to the plaintiff (damages). *Sleweon v. Burke, Murphy, Constanza & Cuppy*, 712 N.E.2d 517, 520 (Ind. Ct. App. 1999), *trans. denied*. To prove causation and the extent of harm in a legal malpractice case, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. *Id.*

Blinn alleged Kammen committed malpractice because he did not call Beal to testify at the initial hearing on the admissibility of Blinn's proffer statements. The designated evidence before us does not suggest Kammen's initial decision not to call Beal changed the outcome of Blinn's criminal proceeding.

After Blinn's indictment, the government sought to introduce Blinn's proffer statement, claiming Blinn violated the proffer agreement. The government premised Blinn's alleged violation on Beal's statement to government agents that Blinn would not speak with them again. At the hearing to determine whether the government could use statements Blinn made during the earlier proffer session, Kammen declined to call Beal. The district court decided the government could introduce at Blinn's trial the contents of his proffer statement.

Immediately before jury selection was to begin, Kammen asked the court to "revisit the whole proffer issue," (Kammen App. at 49), and he called Beal to testify. Beal testified at length about his representation of Blinn, the proffer agreement, and his statements to

federal agents that Blinn would not meet with them again. At the end of that hearing, the court noted its previous decision that the “plain language of the immunity agreement controlled the issue,” and it characterized the testimony of Beal and Blinn as “in essence, I didn’t understand the plain language of that agreement, although both said they read it and carefully discussed it.” (*Id.* at 135.) The judge found that “denial of understanding . . . not credible. I see no reason to revisit that issue based on that additional evidence.” (*Id.*) Thus, despite the addition of Beal’s testimony, the court reaffirmed its earlier decision to admit Blinn’s statements from the proffer session.

It appears Blinn’s only specific allegation of malpractice is that Kammen did not call Beal to testify at the initial hearing regarding whether the government could introduce Blinn’s proffer statements. For example, he asserts “‘Beal’s testimony at the [proffer statement] hearing . . . would have revealed that Beal abandoned his obligation to Blinn and failed to advise him of the government’s repeated insistence that Blinn cooperate.’” However, Kammen refused to put Beal on the stand.” (Appellant’s Br. at 11) (quoting the Hammerle Motion to Reconsider, Blinn App. at 114) (internal citations omitted).

But Kammen eventually *did* “put Beal on the stand,” and the information Blinn now asserts was “concealed from the criminal court by Kammen’s ineffective assistance,” (*id.*), was in fact not “concealed” but was placed before the court. The court considered it, found Beal and Blinn’s testimony not credible, and declined to revisit the admissibility of the proffer statements.

As Blinn did not provide any evidence Kammen’s alleged malpractice was the

proximate cause of the injury Blinn asserts, Kammen was entitled to summary judgment and we accordingly affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.