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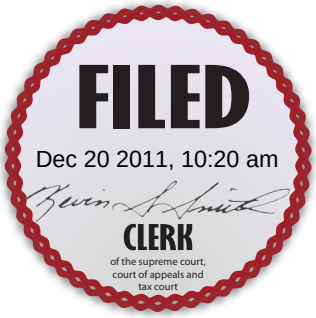

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IN THE
COURT OF APPEALS OF INDIANA

ANDREW M. ROYER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A04-1106-PC-325
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0703-PC-8

December 20, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Andrew Royer (Royer), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Royer raises one issue for our review, which we restate as: Whether his trial counsel provided ineffective assistance.

FACTS AND PROCEDURAL HISTORY

In a prior appeal of this case, we reviewed the factual background as follows:

> In November 2002, ninety-four year-old Helen Sailor lived in an apartment complex for elderly, disabled, and handicapped persons eligible for public assistance. On November 28, 2002, Sailor spent the day with relatives who drove her back to her apartment that evening. The following day, November 29, 2002, Sailor's home healthcare provider and two relatives entered her apartment and found her body. The contents of Sailor's dresser drawers had been emptied out, a lock box was partially pulled out from under the bed, and Sailor's keys and the money she usually kept tucked inside a Bible were missing. An autopsy revealed significant injuries to Sailor's neck, face, and hands, and a forensic pathologist concluded that the cause of Sailor's death was strangulation and the manner of death was homicide.
>
> An initial investigation of Sailor's death revealed no suspects. In August 2003 the Elkhart Police Department again began investigating Sailor's death and received information that Lana Canen may have been involved in the crime. The investigating detective also learned that Royer and Canen were good friends and that Royer was easily influenced by Canen.
>
> The police interviewed Royer on September 3, 2003, at which time he stated that he was responsible for Sailor's death and provided police with details about the crime that had not been released to the public. Royer told

> police that he strangled Sailor with a rope, cleaned her apartment with towels, and that he took jewelry and money.
>
> On September 3, 2003, the State charged Royer with murder but amended its charge to felony murder on August 5, 2005. On August 8, 2005, Royer was tried by a jury. The jury found him guilty of felony murder on August 10, 2005. On September 1, 2005, the trial court sentenced him to fifty-five years.

Royer v. State, No. 20A03-0601-CR-14, slip op. pp. 2-3 (Ind. Ct. App. May 31, 2006). On appeal, Royer challenged the sufficiency of the evidence against him based upon the lack of physical evidence and the reliability of his confession. We noted that both circumstantial evidence and Royer's confession supported his conviction. Regarding the reliability of Royer's confession, we noted that

> Royer in essence argues that [his confessions] were not reliable because he suffers from mental illness, because he changed some of the details of his confession from interview to interview, and because Canen could have told him the details of the crime that he then related to the police. These arguments ask us to examine the credibility of Royer's confessions, and we cannot do that. Royer had an opportunity to attack the reliability of his statements during his jury trial. The jury found them to be reliable and sufficient to support a guilty verdict.

Id., slip op. pp. 4-5. We affirmed the trial court. Royer did not request transfer to our supreme court.

On March 5, 2007, Royer filed a petition for post-conviction relief, which was amended on May 17, 2010. On January 6, 2011, the post-conviction court held an evidentiary hearing on Royer's amended petition. On May 17, 2011, the post-conviction court denied post-conviction relief.

Royer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

We determine whether a petitioner has established his claims to post-conviction relief under a preponderance of the evidence standard. Ind. Post-Conviction Rule 1, § 5; *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Appeal from a denial of post-conviction relief is equivalent to an appeal from a negative judgment. *Henley*, 881 N.E.2d at 643. We will therefore not reverse unless the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id*. at 643-44. Where the post-conviction court has entered findings of fact and conclusions of law, we accept the findings of fact unless clearly erroneous, but accord no deference for conclusions of law. *Id.* at 644.

II. *Ineffective Assistance of Trial Counsel*

Ineffective assistance of counsel claims are subject to the two prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *trans. denied*. Counsel's performance must fall below an objective standard of reasonableness in light of professional norms, and must prejudice the defendant. *Id.* at 996-97. Prejudice is measured by inquiring "whether it is 'reasonably likely' the result would have been different" but for counsel's performance. *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011). "The likelihood of a different result must be substantial, not just conceivable." *Id*. An ineffective assistance of counsel claim fails if either prong of the *Strickland* test is not satisfied. *Henley*, 881 N.E.2d at 645.

Royer alleges that because his trial counsel failed to consult with and offer testimony of a false confessions expert at Royer's trial, his trial counsel's performance was deficient. In support of his argument, Royer points to his trial counsel's pre-trial comments about the need to consult with an expert regarding Royer's confession. Royer's trial counsel stated that,

> "I do not know the nature and the medical condition of Mr. Royer specifically, and [psychologist Dr. John Courtney] may be an expert we may or may not use at trial based upon what he tells us essentially in this case concerning [Royer's] mental stability […] at the time that [Royer] met with the police officers in this case. It is critical information in this case that we need in order to properly be able to represent [Royer] in the trial of this case.

(PTr. p. 16).[1] Royer's trial counsel later affirmed that this was "essential information." (PTr. p. 17). However, Dr. Courtney later informed Royer's trial counsel that Royer should instead seek out an expert in false confessions, and provided some names of experts in the field. Royer's counsel did not contact any of the names provided. By failing to contact such experts, Royer alleges his trial counsel did not perform a reasonable investigation in preparing Royer's defense, and therefore could not have made a reasonable strategic decision on whether to offer expert testimony on false confessions at Royer's trial.

[1] Royer provided transcripts from his original trial as well as the transcripts from his post-conviction relief hearing. The original trial transcripts consist of the record of the trial itself as well as pre-trial and post-trial hearings. We will refer to the transcript of the pre-trial and post-trial hearings as "PTr." and the transcript from the post-conviction relief hearing as "PCR Tr."

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. However, the reviewing court applies "a great deal of deference to counsel's judgments" for ineffective assistance claims based upon a failure to reasonably investigate. *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002). Finally, we note that expert testimony on false confessions is admissible. *Miller v. State*, 770 N.E.2d 763, 773 (Ind. 2002). However, the "decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second guess." *Johnson*, 832 N.E.2d at 1003.

At the post-conviction hearing Royer's trial counsel explained that after he received names of false confession experts from Dr. Courtney, he did not consult with them. Instead, Royer's trial counsel chose to focus on whether Royer was given his anti-psychotic medication prior to the confession as well as how Royer came across in the recordings of his confession. Further, trial counsel explained that since he understood the State's theory to be that Royer was influenced by Canen to commit the crime, it was important for Royer's trial counsel not to portray Royer as someone easily susceptible to influence. Further, Royer's trial counsel offered an additional reason not to present expert testimony.

> [STATE]: Okay. So what was your […] your trial strategy with respect to reputing [sic] the [S]tate's evidence on [Royer's confession]?
>
> [TRIAL COUNSEL]: I have done a lot of cases in front of the juries in this county. They're very skeptical of expert witness testimony. I certainly felt that given the contents of [Royer's taped confession], that Mr. Royer was portrayed as perhaps a slow gentleman. Someone that maybe these

> [twelve] people could see could be manipulated by the police once they knew where he lived.
>
> Once they knew his doctors […] that he had doctor appointments for dealing with mental health issues. And once there became an issue that during that first time that he spoke with the officers he didn't have his medication. And as I recall, that was an issue that I made with Officers [Carl] Conway and [Mark] Daggy at the time of the trial.

(PCR Tr. p. 20). Finally, although Royer's trial counsel characterized Dr. Courtney's consultation as essential prior to trial, at the post-conviction hearing, Royer's trial counsel explained that he did not necessarily believe false confession expert testimony to be essential, "[e]specially when you're uncertain sometimes as to what effect expert testimony could have and how the [State] could attack that expert witness and perhaps cause come [sic] problems for us as well in a way we never anticipated." (PCR Tr. p. 23).

We find that Royer's trial counsel's testimony establishes that there was a reasonable, informed, and strategic choice to forego consulting with and offering testimony from false confession experts. Thus, we cannot say that Royer's trial counsel's performance was deficient in this regard.

Furthermore, Royer has not shown that there was the likelihood of a different result had expert testimony on false confessions been offered. At the post-conviction hearing, Royer presented testimony and an affidavit from Dr. Richard Leo (Dr. Leo), an expert on false confessions. Dr. Leo opined that Royer's interrogation shared a number of similar characteristics with interrogations resulting in false confessions, including factual inconsistencies between the confession and facts presented at trial and the

duration and environment of Royer's interrogations. At Royer's trial, his trial counsel cross-examined the police officers who had interviewed and later conducted Royer's interrogation, Officers Daggy and Conway. Royer's trial counsel focused on the inconsistencies between Royer's statement and the facts presented at trial, the duration and environment of Royer's interrogations, as well as the lack of recording during portions of Royer's interrogations. Accordingly, Royer did not meet his burden to demonstrate prejudice resulting from trial counsel's decision not to offer expert testimony on false confessions. *See Ben-Yisrayl v. State*, 729 N.E.2d 102, 109 (Ind. 2000), *cert. denied*, 534 U.S. 830 (2001).

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court properly found that Royer did not receive ineffective assistance of trial counsel.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur