MEMORANDUM DECISION

APPELLANT, PRO SE

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IN THE
COURT OF APPEALS OF INDIANA

Kevin Derek Riley, Sr.,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent.

September 9, 2022

Court of Appeals Case No. 21A-PC-1760

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No. 45G01-1909-PC-15

Pyle, Judge.

Statement of the Case

[1] Kevin Derek Riley, Sr. ("Riley"), pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Riley argues that the post-conviction court erred by denying him post-conviction relief on his claim of ineffective assistance of trial counsel. Concluding that Riley failed to meet his burden of showing that the post-conviction court erred, we affirm the post-conviction court's judgment.

[2] We affirm.[1]

Issue

Whether the post-conviction court erred by denying post-conviction relief to Riley on his claim of ineffective assistance of trial counsel.

[1] Riley also argues that he has newly discovered evidence that should result in the vacation of his convictions and that he was denied the ineffective assistance of post-conviction counsel, but he cannot raise these arguments in this appeal. Riley's newly discovered evidence claim, which is based upon an affidavit that Riley obtained during the pendency of this appeal, is waived because he did not raise such a claim in his post-conviction petition. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) ("Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal."), *reh'g denied*, *cert. denied*. *See also* Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition."). Riley's ineffective assistance of post-conviction counsel is also waived and unavailable for review because he appeared pro se at the post-conviction hearing and is precluded from arguing that his self-representation was ineffective. *See Warr v. State*, 877 N.E.2d 817, 823 (Ind. Ct. App. 2017) ("[A] defendant who chooses to proceed pro se must accept the burdens and hazards of self-representation and may not assert a Sixth Amendment claim of ineffective assistance of counsel."), *trans. denied*.

Facts

[3] The relevant facts of Riley's underlying offenses, as set forth by this Court in Riley's direct appeal, are as follows:

> In January 2014, Riley was dating Marian Robertson. On January 13, 2014, they spent the day running errands. They went to a pawn shop and a gas station, where they were recorded by surveillance cameras. Thereafter, they went to another convenience store where they talked to Marian's cousin. Marian's cousin told Marian that Marian's sister, Tamika Robertson, wanted to talk to Marian.
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> Marian called Tamika, who reported Riley was having sex with April Bailey. Tamika believed April had AIDS. Marian confronted Riley, who denied the sexual allegations. Riley and Marian both contacted April. Subsequently, they drove over [to] the house where April lived with her three children and another couple.
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> April came outside to talk to Marian. Marian spoke with April in her driveway and in the street near Marian's car. Riley stayed in the car during their conversation. April's son, K.B., saw the women talking. April's daughter, M.B., called out the door to see if her mother was alright and then returned inside. Toward the end of the conversation, April gave Marian a "side hug." (Tr. Vol. 3 at 183.) Marian heard, "Pow." (*Id.* at 184.) Riley told Marian, "Bitch, get in the car . . . . Bitch, drive, before I kill you." (*Id.*) They drove away. M.B. and K.B. heard the gunshot and exited the house to find their mother lying in the middle of the street. She had been shot in the face.
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> Marian and Riley drove to the house of Riley's brother, Mack. Riley went inside while Marian stayed in the car. Then, they drove to the elder care facility where Riley's mother resided. They signed in at 5:30 p.m. Around 8:00 p.m., Marian took Riley to the home of his child's mother, Demetria Morris.

> Marian then returned to spend the night with Riley's mother at the elder care facility. Marian did not contact the police.
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> The next day, Marian and Riley ran some errands. Later that day, spurred by a tip, the police arrested Marian and Riley. Marian was interviewed but lied to the police about her interactions with April because she was afraid of Riley. During her second interview with the police, after she was assured the police would keep her safe, Marian told them Riley had shot April. Riley denied having been in contact with April that day. The State charged Riley with murder.[2]
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> While incarcerated, Riley contacted his brother, Mack, via telephone. He told Mack to retrieve the "twin" from Riley's dresser. (Tr. Vol. 5 at 110.) Officers speculated that "twin" referenced the bullets that went with the gun Riley used to shoot April. (*Id.* at 112.) The police had already executed a search of Riley's residence and retrieved everything from the dresser, including a box of ammunition.
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> Demetria received a letter from Riley that stated: ". . . you need to let [the police] know that It was still day-light out when I came up there this is very 'important' Don't say anything other than I know it was still day light when he came up here." (Ex. Vol. 1 at 35) (errors and emphases in original). Because the envelope had Riley's name on it and the contents of the letter "referr[ed] to his son as Jr.[,]" (Tr. Vol. 4 at 164), Demetria believed the letter to be written by Riley even though she had never seen his handwriting before.

Riley v. State, 45A05-1708-CR-1821 at *1-2 (Ind. Ct. App. May 25, 2018) (bracketed footnote added), *trans. denied*.

[2] The State also charged Riley with Level 4 felony unlawful possession of a firearm by a serious violent felon and filed a use-of-a firearm enhancement allegation for the use of a firearm while committing the murder.

[4] Prior to trial, Riley's trial counsel, Mark Gruenhagen ("Trial Counsel Gruenhagen"), filed a motion in limine seeking to exclude the State's proposed witness, State Police forensic document examiner Courtney Baird, from offering her testimony as expert opinion on the handwriting analysis of Riley's letter to Demetria. The trial court held a hearing on Riley's motion, which, according to the record, the parties referred to as a Daubert hearing. During the hearing, the State presented Baird's proposed testimony and her procedure for analyzing handwriting in a document, and Trial Counsel Gruenhagen cross-examined her. The trial court denied Riley's motion in limine.

[5] The trial court held a jury trial in June 2017. Riley's theory of defense was that Marian, not Riley, had killed April. The facts of Riley's jury trial, as set forth by this Court in Riley's direct appeal, are as follows:

> Over Riley's objection, the trial court allowed Courtney Baird, a forensic document examiner with the Indiana State Police, to testify as an expert witness. Baird compared the letter sent to Demetria with other writing by Riley, specifically "six pages of request known writing and three forms and a half page of non-request known writing." (Tr. Vol. 6 at 171.) Baird indicated the request known writing had indications of an attempt to disguise or distort. However, she was able to proceed to a comparison. Baird determined it was "probable that Kevin Riley . . . was the writer of the letter." (*Id.* at 197.) She explained: "The opinion [']probable[']means that evidence contained in the handwriting points rather strongly towards both the questioned and the known writing, [sic] having been written by the same individual. However, it is short of virtually certain degree of confidence." (*Id.*)

Preston Meux, a friend of Riley, was incarcerated at the same time as Riley. Riley gave Meux a letter to give to Mack. Meux lost the letter while he was processing out of jail. He wrote down what he remembered it to say. He wrote: "Yo Bro said to talk to Marian and tell her don't say shit else and not to show up to court anymore. And if she on that bs, then do what you gotta do. Also if the cops ask tell them that the twin he told you to get out the dresser meant drugs." (Tr. Vol. 5 at 22; Ex. Vol. 1 at 66) (errors in original). Meux wrote this out on the back of a receipt with the reminder: "GIVE TO MACK." (Ex. Vol. 1 at 66.) Meux left the note on the door of Mack's house. Jessica Mitchell, another occupant of the house, retrieved the note and gave it to her mother, Dorothy Robertson, who is Marian's "auntie." (Tr. Vol. 5 at 57.) Dorothy gave the note to Marian. Marian gave the note to Lake County Sheriff's Department Detective Joseph Hardiman. Over Riley's objection, Detective Hardiman testified Marian was afraid because the note appeared to confirm Riley was a threat to her.

At trial, Riley wanted to question Meux regarding a pre-trial diversion ("PTD") agreement Meux had signed during the pendency of Riley's case. Both the State and Meux said the agreement was not offered as a benefit for Meux's testimony in Riley's case. When the trial court asked Meux about receiving a benefit for his testimony, Meux explained he had not received a benefit for his testimony because, he "had a witness to come forth on that case to say that [he] didn't—[he] was not in possession of a firearm or anything like that. That's why [his] charges was dropped and everything because it was a witness on [his] case." (*Id.* at 40) (errors in original). When asked specifically if he had received a benefit from the State for his testimony in Riley's case, Meux unequivocally answered, "No." (*Id.* at 44.)

Rogerick Denham was incarcerated with Riley. He testified Riley and he had formed a friendship and Riley wished him to "demonstrate" on [or kill] Marian. (Tr. Vol. 7 at 78.) Denham

> reported Riley's request through an anonymous tip line provided at the jail. Denham told Detective Hardiman that Riley offered to have "some woman" bail him out of jail. (*Id.* at 80.) However, that never came to fruition. Working with police, Denham was released from jail with an electronic monitoring device. Denham said Riley told him who to contact to obtain a murder weapon and to learn how to find Marian. Denham contacted those individuals, but no weapon or information was ever provided.
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> The jury found Riley guilty as charged. The court imposed an aggregate sentence of ninety-one years in the Department of Correction.

Id. at *2-3 (original footnotes omitted).

[6] Riley filed a direct appeal and challenged the trial court's rulings on the admission and exclusion of evidence. Specifically, Riley argued that the trial court had abused its discretion by: (1) allowing the State's witness to give expert opinion testimony regarding handwriting analysis; (2) denying Riley's request to cross-examine Meux about his PTD agreement; (3) allowing the detective to testify about Marian's state of mind; and (4) denying Riley's proffered evidence to challenge Denham's credibility. This Court, in a memorandum decision, determined that the trial court's evidentiary rulings were not erroneous and affirmed Riley's convictions. *Id.* at *5-8.

[7] In August 2019, Riley filed a pro se petition for post-conviction relief. The State Public Defender's Office initially entered an appearance for Riley but then withdrew from the case in January 2020 pursuant to Post-Conviction Rule 1(9)(c). In April 2020, Riley filed an amended pro se petition for post-

conviction relief in which he raised allegations of ineffective assistance of trial and appellate counsel.

[8] In October 2020, the post-conviction court held a hearing on Riley's amended petition. Riley called Trial Counsel Gruenhagen and his appellate counsel as witnesses. Thereafter, in July 2021, the post-conviction court issued an order denying Riley's petition on his claims of ineffective assistance of counsel for post-conviction relief contained in his post-conviction petition.

[9] Riley now appeals.[3]

Decision

[10] Riley argues that the post-conviction court erred by denying him post-conviction relief only on his claim of ineffective assistance of trial counsel. At the outset, we note that Riley has chosen to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. Thus, pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Id.* "We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be

[3] We note that Riley has included a copy of the post-conviction hearing transcript in the Appellant's Appendix. We direct Riley's attention to Indiana Appellate Rule 50(F), which provides that "parties should not reproduce any portion of the Transcript in the Appendix" because the "Transcript is transmitted to the Court on Appeal pursuant to [Appellate] Rule 12(B)[.]"

understood." *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied*.

[11] Our standard of review in post-conviction proceedings is well settled.

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal case citations omitted), *trans. denied.* "We review the post-conviction court's factual findings under a 'clearly erroneous' standard but do not defer to the post-conviction court's legal conclusions." *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *reh'g denied*, *cert. denied*. Additionally, "[w]e will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and reasonable inferences that support the decision of the post-conviction court." *Id.*

[12] On appeal, Riley challenges the post-conviction court's conclusions on his claim of ineffective assistance of trial counsel. Specifically, he contends that his trial counsel rendered ineffective assistance by failing to: (1) conduct adequate pretrial investigation, including the failure to (a) interview occupants of April's house, (b) failing to obtain discovery from the State of M.B.'s police interview and fully investigate the window tint on Marian's car, and (c) failing to call a handwriting expert as a witness to rebut the State's handwriting witness; (2) effectively conduct a cross-examination of Marian and M.B.; and (3) call Tamika as a witness.

[13] Riley, however, did not raise all of these specific claims in his amended post-conviction petition and has, therefore, waived them on appeal. "Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." *Allen*, 749 N.E.2d at 1171. *See also* Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition."). In Riley's amended post-conviction petition, he generally alleged that his trial counsel had failed to adequately investigate, obtain discovery, and call witnesses. However, the only argument in Riley's appellate brief that he specifically included in his amended post-conviction petition is his challenge to trial counsel's failure to call a handwriting expert as a witness to rebut the State's handwriting witness. Because the remaining ineffective assistance of trial counsel claims in his appellate brief were not included in his amended post-conviction petition, Riley has waived those issues, and we will not address them in this appeal. *See Allen*,

749 N.E.2d at 1171. Accordingly, we will address only the claim that his trial counsel rendered ineffective assistance of counsel by failing to call a handwriting expert as a witness to rebut the State's handwriting witness.

[14] A claim of ineffective assistance of counsel requires a petitioner to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied*, *cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either of the two prongs will cause the claim to fail." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). "Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id.* Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). Moreover, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Because counsel is afforded considerable discretion in choosing strategy and

tactics, a strong presumption arises that counsel rendered adequate assistance. *Id.*

[15] Turning to Riley's claim that his trial counsel rendered ineffective assistance by failing to call a handwriting expert as a witness to rebut the State's handwriting witness, we note that Riley questioned Trial Counsel Gruenhagen about this claim during the post-conviction hearing, and the State cross-examined counsel on it. The post-conviction court summarized Trial Counsel Gruenhagen's hearing testimony regarding this claim in the following finding:

> 18. [Trial Counsel] Gruenhagen testified at the post-conviction relief hearing as follows:
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> i) that rather than call a handwriting expert to challenge the State's expert witness, [counsel] was allowed great latitude at trial to go over Daubert issues and challenge them in front of the jury where he cross-examined the State's witness on her finding of "probable" related to the handwriting at issue, and [he] challenged said witness with her own scholarly article to attack her credibility. [Trial Counsel] Gruenhagen further testified that on cross-examination, the State's expert witness testified to a range of identities (excluded/neutral/identified), and that by not being able to identify Riley, she [had] violated her own norms, and [had] "basically confessed" on the stand that she did not have enough evidence to say "that man [Riley] did it.". . . .

(App. Vol. 2 at 15-16). The post-conviction court concluded that Trial Counsel Gruenhagen's testimony revealed that he had made a strategic decision on whether to call an expert witness.

[16] "It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel." *Waldon v. State*, 684 N.E.2d 206, 208-09 (Ind. Ct. App. 1997), *trans. denied*. Moreover, our supreme court has held that "the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance." *Kubsch v. State*, 934 N.E.2d 1138, 1150 (Ind. 2010), *reh'g denied*.

[17] Trial Counsel Gruenhagen made a reasonable strategic decision that it was not necessary to call a handwriting expert to challenge the State's handwriting witness. Instead, counsel decided to challenge the State's witness on cross-examination. Riley has failed to show that counsel's trial strategy constituted deficient performance. Moreover, Riley has failed to show that there is a reasonable probability that, but for his trial counsel's alleged error, the result of the proceeding would have been different. Accordingly, we affirm the post-conviction court's denial of post-conviction relief on Riley's claim of ineffective assistance of trial counsel.

[18] Affirmed.

May, J., and Brown, J., concur.