MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

William Reiske,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 12, 2021

Court of Appeals Case No. 20A-PC-2195

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-1904-PC-35

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, William Reiske (Reiske), appeals the post-conviction court's Order denying his petition for post-conviction relief.

[2] We affirm.

ISSUE

[3] Reiske presents this court with one issue on appeal: Whether he was denied the effective assistance of Trial Counsel.

FACTS AND PROCEDURAL HISTORY

[4] The facts of the underlying offenses as found by this court on direct appeal are as follows:

> [O]n the night of December 28 through the morning of December 29, 2013, a group of college-aged friends, including Reiske, N.B., G.B., R.L., A.H., M.K., and T.H., were "hanging out" at N.B.'s Allen County home. During the gathering, Reiske "target[ed]" T.H., who at that time was seventeen years old, by giving her shots and "trying to get [her] drunk." Reiske gave T.H. "eight [drinks] at least." After several guests had either left the party or gone to sleep, R.L. and A.H. remained in the basement with Reiske, M.K., and T.H. R.L. testified that Reiske began doing and saying things to T.H. that "just didn't seem right." Reiske's actions made R.L. feel uncomfortable, so he suggested it was time for bed. R.L. and A.H. went upstairs, leaving Reiske, M.K., and T.H. downstairs.
>
> Soon thereafter, R.L. and A.H. went outside to smoke a cigarette and, through a basement window, they observed Reiske performing oral sex on T.H., who was naked from the waist

down. T.H. showed no reaction; due to her intoxication, she was in "kind of like a zombie state." While Reiske was performing oral sex on T.H., M.K. was using Reiske's cell phone to film the sex act. R.L. and A.H., unsure what to do, woke G.B. and N.B., who went outside and, through the window, also saw Reiske performing oral sex on T.H. The young men went toward the basement stairs, calling out to ask what was going on. Reiske replied, "[N]othing, it[']s fine. [D]on't worry about it, just go back upstairs." N.B. then called out to T.H., who did not respond. Instead, Reiske called up to say, "[S]he's fine." Knowing that Reiske's responses were not consistent with what they had seen, R.L., A.H., G.B., and N.B. went into the basement and helped T.H. up the stairs—T.H. was "still in that zombie state where she—you could tell she didn't really know what was going on."

T.H. retained only a few clear memories of that night. She specifically remembered "arriving, taking a shot, playing videogames and . . . waking up." When she awoke in the basement, Reiske was on top of her, and M.K. had a phone. T.H. remembered that, shortly thereafter, "[G.B.] and [R.L.] and [A.H.] came running in and yelling. . . . They were just yelling like probably stop, stop." T.H. then remembered getting dressed and being helped upstairs. She also remembered, as if she were having "an out of body experience," that Reiske touched her vagina with his hands and tongue. T.H. did not remember how her clothes were removed.

The incident was subsequently reported to police, and on December 9, 2014, the State charged Reiske with two counts of Class B felony criminal deviate conduct and one count of Class A misdemeanor contributing to the delinquency of a minor.

Reiske v. State, No. 02A03-1702-CR-377, slip op. pp. 2-5 (Ind. Ct. App. Sept. 27, 2017) (trial record citations omitted). Reiske retained Trial Counsel to represent him.

[5] On September 29, 2015, the trial court convened Reiske's two-day jury trial. Before the presentation of the evidence began, Trial Counsel successfully moved to exclude any references to, or evidence of, Reiske's statements earlier in the evening in question that he was in the process of constructing an amateur pornography website. G.B., R.L., A.H., N.B., and M.K. testified regarding their observation of T.H.'s state at the time of the criminal deviate conduct offenses, which they characterized as not appearing to know what was going on, in a "zombie state," "like a zombie," "[n]ot doing anything," and "very drunk and out of it," respectively. (Trial Transcript Vol. I, p. 244; Vol. II, pp. 15, 28, 51). Trial Counsel developed testimony through cross-examination of these witnesses and T.H. regarding the fact that T.H. was the only female in attendance at the party and that everyone had been intoxicated to some degree. Trial Counsel examined M.K. at length regarding the details of his plea agreement with the State to resolve a felony voyeurism charge stemming from his role in the offenses. Reiske did not testify on his own behalf. Trial Counsel tendered the following instruction:

> You are instructed as a matter of law that T.H.'s unawareness is a material element of the crime charged, thus requiring the Defendant to have been aware of a high probability that she was unaware that the sexual activity was occurring.

(Trial App. Vol. II, p. 196). The instruction was not given to the jury because the trial court ruled it was covered by other final instructions. Trial Counsel objected to the State's proposed instruction on voluntary intoxication, arguing that it was not supported by the evidence and Reiske "did not interpose the defense of intoxication." (Trial Tr. Vol. II, p. 100). Trial Counsel argued in closing that it could be inferred from the evidence that T.H. had been out for a "good time" when she attended the party and that the ability of the other party guests to accurately perceive what occurred was clouded by alcohol. (Trial Tr. Vol. II, p. 128). Trial Counsel also reminded the jury that the State had a demanding burden of proof and argued that M.K.'s testimony had been the result of his plea agreement. The jury found Reiske guilty as charged.

[6] On November 2, 2015, due to double jeopardy concerns, the trial court merged one of Reiske's Class B felony convictions and sentenced him to ten years, with two years suspended to probation. The trial court also sentenced Reiske to one year for his Class A misdemeanor conviction, to be served concurrently. On October 17, 2016, Reiske moved to modify his sentence. On January 27, 2017, the trial court denied Reiske's motion, and, on September 27, 2017, this court affirmed that denial.

[7] On April 26, 2019, Reiske filed a petition for post-conviction relief in which he claimed that Trial Counsel had rendered ineffective assistance because: (1) Trial Counsel had impermissibly deprived him of his right to testify on his own behalf, and (2) Trial Counsel had relied on the inapplicable defense of voluntary intoxication. On February 7, 2020, the post-conviction court held a hearing on

Reiske's petition. Trial Counsel testified that he had been practicing for forty-seven years, primarily in criminal law. Trial Counsel had represented Reiske in a previous, unrelated matter and was his attorney in the T.H. case for eight or nine months before trial. Acknowledging that criminal defense attorneys have a duty to allow their clients to decide whether or not to testify, Trial Counsel recounted that he had informed Reiske of his Fifth Amendment right to testify or to decline to do so. According to Trial Counsel, Reiske had asked about testifying, but Trial Counsel had advised against it. This advice was based on Trial Counsel's observation that Reiske was intelligent but egotistical and that he would not be perceived well by the jury. Trial Counsel also feared that Reiske might inadvertently open the door on cross-examination to the excluded evidence of his amateur pornography website. Trial Counsel denied ever telling Reiske he could not testify. Rather, Reiske accepted his advice and followed it. Instead of having Reiske testify, Trial Counsel attempted to "stir the pot" by pursuing a defense that the perceptions of the State's witnesses, including T.H., were clouded due to alcohol consumption. (PCR Transcript Vol. II, p. 14). On November 2, 2020, the post-conviction court issued its findings of fact and conclusions thereon denying relief.

[8] Reiske now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[9] Petitions for post-conviction relief are civil proceedings in which a petitioner may present limited collateral challenges to a criminal conviction and sentence.

Weisheit v. State, 109 N.E.3d 978, 983 (Ind. 2018). In a post-conviction proceeding, the petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id*. When a petitioner appeals from the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014). To prevail on appeal from the denial of a petition for post-conviction relief, the petitioner must show that the evidence "as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Id*. In addition, where a post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to its legal conclusions, but we will reverse its findings and judgment only upon a showing of clear error, meaning error which leaves us with a definite and firm conviction that a mistake has been made. *Id*. In making this determination, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's judgment. *McKnight v. State*, 1 N.E.3d 193, 199 (Ind. Ct. App. 2013).

II. *Ineffective Assistance of Counsel*

[10] Reiske contends that he was denied the effective assistance of his trial counsel. We evaluate ineffective assistance of counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a petitioner must show that 1) his counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance

prejudiced the defense. *Weisheit*, 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 687). In analyzing whether counsel's performance was deficient, we consider whether, under all the circumstances, counsel's actions were reasonable under prevailing professional norms. *Id*. "Counsel is afforded considerable discretion in choosing strategy and tactics, and judicial scrutiny of counsel's performance is highly deferential." *Id*. In order to demonstrate sufficient prejudice, the petitioner must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. (citing *Strickland*, 466 U.S. at 694). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. A petitioner's failure to satisfy either the 'performance' or the 'prejudice' prong of a *Strickland* analysis will cause an ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

A. *Decision to Testify*

[11] Reiske claims that Trial Counsel denied him effective assistance by impermissibly usurping the decision of whether he should testify on his own behalf. A defendant in a criminal proceeding has an absolute constitutional right to testify as part of his defense. *Phillips v. State*, 673 N.E.2d 1200, 1201-02 (Ind. 1996). The decision of whether or not to testify is controlled by the defendant, and defendant's counsel is ethically bound to abide by the defendant's decision in the matter. *Id*. at 1202; *see also Rules of Professional Conduct* 1.2(a) (2005) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will

testify."). We will not conclude that a defense lawyer violated this right unless the lawyer specifically forbade the defendant from testifying. *See Correll v. State*, 639 N.E.2d 677, 681-82 (Ind. Ct. App. 1994) (holding that, absent any testimony by Correll that his trial counsel had forbidden him from testifying, his claim after conviction that his lawyer would not let him testify and that he perceived he would not be allowed to testify did not substantiate the denial of his right to testify for purposes of an ineffective assistance of counsel claim).

[12] The post-conviction court concluded that Trial Counsel did not forbid Reiske from testifying. This determination was supported by Trial Counsel's testimony at the post-conviction hearing that he counseled Reiske before and during trial not to testify but that he never told Reiske that he could not testify. Reiske acknowledged at the post-conviction hearing that Trial Counsel had advised him not to testify. Reiske did not state at the post-conviction hearing that Trial Counsel had forbidden him from testifying. Pursuant to our standard of review, we conclude that the post-conviction court's conclusion was supported by the evidence, and thus, was not clearly erroneous. *See McKnight*, 1 N.E.3d at 199. Following *Correll*, we also conclude that Reiske has failed to establish that Trial Counsel rendered ineffective assistance.

[13] Inasmuch as Reiske argues that Trial Counsel rendered ineffective assistance by advising him not to testify, we also reject that claim. "[I]t is extremely common for criminal defendants not to testify, and there are good reasons for this[.]" *Correll*, 639 N.E.2d at 681 (quoting *Underwood v. Clark*, 939 F.2d 473, 475 (7th Cir. 1991)). Whether a defendant should testify is a matter of trial strategy.

White v. State, 25 N.E.3d 107, 134 (Ind. Ct. App. 2014), *trans. denied*. "We will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best." *Id*.

[14] Here, Trial Counsel, who had been practicing criminal law for nearly fifty years, had represented Reiske in a prior unrelated matter, and by the time of Reiske's trial on the charges pertaining to T.H., he had represented Reiske for eight-to-nine months. Trial Counsel stated at the post-conviction hearing that his decision to advise Reiske not to testify was based on his determination that Reiske would appear egotistical and unsympathetic to the jury. Thus, Trial Counsel's decision was made after having an opportunity to observe Reiske and was an exercise of his professional judgment. In light of Trial Counsel's testimony, Reiske has failed to establish that his counsel's performance was defective. *See Canaan v. State*, 683 N.E.2d 227, 229-30 (Ind. 1997) (rejecting Canaan's ineffectiveness of trial counsel claim where counsel testified that she had advised him against testifying during the penalty phase because she feared he would appear cold and unsympathetic to the jury). Trial Counsel was also concerned that Reiske might inadvertently open the door on cross-examination to evidence regarding Reiske's amateur pornography website that Trial Counsel had successfully obtained a ruling to exclude. This circumstance further buttresses our conclusion that Trial Counsel's advice was a reasonable trial strategy, one which we will not second-guess. *See White*, 25 N.E.3d at 134.

Because Reiske has failed to establish that Trial Counsel's performance was deficient, we will not disturb the post-conviction court's denial of relief.[1]

B. *Voluntary Intoxication*

[15] Reiske also argues that Trial Counsel was ineffective for relying on the defense theory of voluntary intoxication when that was not a viable defense available to him. Reiske draws our attention to Indiana Code section 35-41-2-5 which provides that "intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense" unless the defendant meets certain requirements that are not implicated by this case.

[16] However, we do not undertake a *Strickland* analysis of this claim because Trial Counsel did not present a voluntary intoxication defense. At Reiske's trial on the underlying offenses, Trial Counsel never argued to the jury or developed testimony showing that Reiske was incapable of forming the requisite *mens rea* for the offenses due to his intoxication. Rather, Trial Counsel attempted to impugn the credibility of the State's witnesses through cross-examination showing that they were intoxicated and, thus, did not accurately assess what they had observed during the evening in question. Trial Counsel also defended Reiske by arguing that T.H. had been at the party for sex, and he attacked

[1] Given our disposition, we need not address Reiske's claim that he was prejudiced by his counsel's performance. *See Taylor*, 840 N.E.2d at 331.

M.K.'s credibility by attempting to show that his testimony was influenced by his plea agreement.

[17] Reiske asserts that Trial Counsel presented a voluntary intoxication defense because counsel proffered a final instruction that Reiske had "to have been aware of a high probability that [T.H.] was unaware that sexual activity was occurring." (Appellant's Br. p. 17). We agree with the State that this instruction, which was not even given to the jury, did not mention voluntary intoxication or invoke a voluntary intoxication defense. Indeed, Trial Counsel objected to the State's proffer of a voluntary intoxication instruction specifically because Reiske "did not interpose the defense of intoxication." (Trial Tr. Vol. II, p. 99). Because Reiske's claim that Trial Counsel relied upon a voluntary intoxication defense is not supported by the record, we need not address it further.

CONCLUSION

[18] Based on the foregoing, we conclude that Reiske was not denied the effective assistance of Trial Counsel.

[19] Affirmed.

[20] Mathias, J. and Crone, J. concur