MEMORANDUM DECISION

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ATTORNEYS FOR APPELLANT

Michael C. Cunningham
Zachary J. Anderson
Judson G. McMillin
Mullin McMillin & McMillin, LLP
Brookville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Myron Stephen Davisson,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Plaintiff.

October 31, 2022

Court of Appeals Case No. 22A-PC-953

Appeal from the Union Circuit Court

The Honorable Matthew R. Cox, Judge

Trial Court Cause No. 81C01-1903-PC-46

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Myron Davisson (Davisson), appeals the post-conviction court's summary disposition of his petition for post-conviction relief.

[2] We reverse and remand for further proceedings.

ISSUE

[3] Davisson presents this court with one issue, which we restate as: Whether genuine issues of material fact exist precluding summary disposition of Davisson's petition for post-conviction relief.

FACTS AND PROCEDURAL HISTORY[1]

[4] The facts of Davisson's underlying convictions as found by this court on direct appeal are as follows:

> On February 23, 2014, after receiving a phone call from another detective, Detective Andrew Wandersee (Detective Wandersee) of the Indiana State Police drove to a church in Liberty, Indiana to speak to fourteen-year-old E.C. and investigate her claim that her step-father, Davisson, had molested her. Detective Wandersee interviewed E.C. and then went to Davisson's home to talk to Davisson and E.C.'s mother. Davisson denied the allegations; however, he agreed to take a polygraph test which was scheduled for February 27, 2014 at the Wayne County Sheriff's Department. Davisson arrived in his own vehicle at

[1] In his Brief, Davisson did not fully redact the names of E.C. and K.D., both of whom were minors at the time they testified at Davisson's trial on the underlying offenses. We remind Davisson's counsel that the names of child witnesses in cases involving sex offenses are excluded from public access. Ind. Access to Court Records Rule 5(C)(2).

approximately 1:00 p.m. and met with Detective Wandersee and Detective Todd Barker (Detective Barker), who administered the polygraph test. Davisson proceeded to an interview room, which stayed unlocked during the interview. The interview lasted for approximately three hours. Detective Barker advised Davisson of his *Miranda* rights and gave him a copy of the waiver form to read along before starting the interview. Davisson signed the waiver and agreed to proceed. He stated he understood his rights and at no time requested an attorney. Davisson was questioned by one detective at a time.

Upon advising Davisson of the results of the polygraph test, the officers continued to question him and made several references to his religion urging him to tell the truth. As the interview progressed, Davisson first admitted to entering E.C.'s room, then to fantasizing about having sex with E.C., then to touching her on her thigh, and finally to touching her on her vagina two or three times. At that point, Davisson was placed under arrest.

Davisson was originally charged with two Counts; however, on February 12, 2015, the State filed an amended Information ultimately charging Davisson with the following offenses: Count I, child molesting, a Class C felony; Count II, sexual misconduct with a minor, a Class D felony; Count III, child molesting, a Class A felony; Count IV, rape, a Class B felony; Count V, sexual misconduct with a minor, a Class B felony; and Count VI, sexual misconduct with a minor, a Class C felony.

On April 1, 2015, Davisson filed a Motion to Suppress Statements. In his motion, Davisson asserted that his statements to law enforcement on February 27, 2014, were made involuntarily in violation of his rights under the Fifth Amendment to the United States Constitution. On April 10, 2015, the trial court held a hearing, and on April 13, 2015, the trial court issued an order denying Davisson's suppression motion.

Davisson v. State, No. 81A05-1505-CR-359, slip op. at 1 (Ind. Ct. App. Feb. 18, 2016). On April 14, 2015, the trial court convened Davisson's four-day jury trial at which Davisson was represented by Trial Counsel. During his opening statements, the prosecutor informed the jury that

> [y]ou will hear that . . . Davisson prepared [E.C.], and what . . . [i]n . . . Indiana courts call grooming. That he groomed her to become a victim. That he exposed her to his body, that he exposed her to sexual things, he exposed her to his nude body, so that she would become a victim of his. In Indiana we call that grooming.

(Trial Transcript Vol. I, p. 178). The prosecutor also informed the jury that Amanda Wilson (Wilson), who worked at JACY House and had forensically interviewed E.C., would testify. The prosecutor related to the jury that

> [y]ou're gonna hear from [] Wilson, who has loads of experience in this, has interviewed almost 700 children victims of cases like this . . . about grooming.

(Trial Tr. Vol. I, p. 178). Trial Counsel did not object to the prosecutor's opening statements. E.C. testified regarding acts of molestation by Davisson and was subjected to cross-examination by Trial Counsel. One of E.C.'s friends, K.D., testified that she had seen Davisson grab E.C. by her arm and yank her from her bed and that she had seen Davisson put E.C.'s brother in a choke hold. Trial Counsel did not object to K.D.'s testimony, but Trial Counsel cross-examined K.D. Wilson testified regarding her training and experience, E.C.'s interview, and the concepts of grooming and delayed

disclosure. Trial Counsel also cross-examined Wilson. During the presentation of Davisson's defense, Trial Counsel did not call an expert on false confessions. Davisson testified on his own behalf and was subjected to cross-examination. At the conclusion of the evidence, the jury found Davisson guilty as charged. On April 27, 2015, the trial court sentenced Davisson to an aggregate sentence of sixty-one years.

[5] Davisson pursued a direct appeal and raised two issues: (1) whether his statement to the police was involuntary; and (2) whether his sentence was inappropriate. This court affirmed, holding that, in light of the totality of the circumstances, Davisson's confession was not involuntary and that, given the nature of the offenses and his character, his sentence was not inappropriate. *Davisson*, slip op. at 14-16.

[6] In 2016, Davisson filed a petition for post-conviction relief that was dismissed without prejudice in 2019. On March 22, 2019, Davisson filed a verified petition for post-conviction relief, which he amended on May 10, 2021.[2] In paragraphs eight and nine of his petition, which incorporated his memorandum in support, Davisson raised four claims of ineffectiveness of Trial Counsel. First, Davisson claimed that Trial Counsel had failed to consult and subpoena an expert witness on false confessions and that, had Trial Counsel "consulted a

[2] On May 10, 2021, Davisson filed a motion for leave to amend his petition for post-conviction relief and attached his proposed amended petition and memorandum in support. The chronological case summary in this matter does not indicate that the post-conviction court granted Davisson's motion, but the State, who responded to the amended petition, does not contend that Davisson failed to successfully amend his petition.

false confession expert and called the expert to testify at trial, Davisson would not have opted to testify in his own defense." (Appellant's App. Vol. II, p. 88). According to Davisson, Trial Counsel "did not bother" to consult with a false confession expert. (Appellant's App. Vol. II, p. 90). Davisson's second ground of ineffectiveness alleged that Trial Counsel had failed to object to K.D.'s testimony, which he contended was irrelevant and prejudiced him. As a third claim, Davisson contended that Trial Counsel had failed to object to the prosecutor's comments during opening argument regarding Wilson and her expected testimony. Davisson argued that the prosecutor's remarks constituted improper vouching and that Trial Counsel's failure to object resulted in his convictions. As his fourth claim, Davisson alleged that Trial Counsel's failure to investigate Wilson and effectively cross-examine her resulted in his convictions. One of the areas Davisson argued that Trial Counsel should have investigated was Wilson's training and experience. In support of this claim, Davisson argued that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation" and that Trial Counsel's failure to investigate Wilson "at all . . . cannot possibly be attributed to strategy, because [T]rial [C]ounsel's strategy could not have been to do nothing at all with regard to the JACY House interviewer in defense of allegations of rape and molestation." (Appellant's App. Vol. II, pp. 93-94). According to Davisson, Trial Counsel's failure to investigate led to ineffective cross-examination of Wilson at trial which was prejudicial to him.

[7] Also on May 10, 2021, the State filed its Response in Opposition to Petitioner's Petition for Post-Conviction Relief. One of its responses was that the "State of Indiana denies the allegations contained in rhetorical paragraphs 8 and 9 of the Petition." (Appellant's App. Vol. II, p. 97). On May 27, 2021, the State filed an additional response to Davisson's petition for post-conviction relief in which it requested that the post-conviction court grant summary disposition of Davisson's petition, arguing that Davisson had raised no genuine issue of material fact and that the State was entitled to judgment as a matter of law. The State argued that Davisson could not meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show that Trial Counsel's performance had been deficient or that Trial Counsel's performance had adequately prejudiced him. As part of its response, the State argued that "Davisson was not backed into a corner whereby he had to waive his 5th Amendment right against self-incrimination because his counsel didn't utilize expert testimony regarding "false confessions."[3] (Appellant's App. Vol. II, p. 102). As to Davisson's fourth claim regarding Trial Counsel's failure to adequately investigate and cross-examine Wilson, the State acknowledged that, in order for Davisson to show prejudice on that claim, it was necessary for him to go outside the trial record and show what any additional investigation would have produced. The State responded to Davisson's contention that Trial Counsel should have investigated and questioned Wilson at trial about certain topics, including her

[3] The State has not argued that our decision in Davisson's direct appeal has any preclusive effect on Davisson's argument regarding Trial Counsel's failure to call an expert on his purportedly false confession.

training and experience, by arguing that "[i]n hindsight this line of questions could very well could [sic] have bolstered Ms. Wilson's testimony." (Appellant's App. Vol. II, p. 107). On November 22, 2021, the State filed an additional Motion for Summary Disposition in which it reiterated its request for summary disposition of Davisson's petition for post-conviction relief but did not assert any additional substantive argument regarding the lack of genuine issues of material fact to be determined at an evidentiary hearing.

[8] On March 11, 2022, the post-conviction court held oral argument on the State's motion for summary disposition. The State argued that it did not contest certain factual allegations made by Davisson, agreeing that Trial Counsel had not called an expert on false confessions and that he had not raised contemporaneous objections at trial to K.D.'s testimony or to the prosecutor's opening statements. However, the State contended that the judge presiding over the post-conviction proceedings, who had also presided over Davisson's trial, could dispose of Davisson's petition for post-conviction relief based on the record of his trial on the underlying offenses and the allegations of his petition. Davisson argued that there was evidence outside of the trial record that Wilson had fewer hours of training than she had testified to at trial and that Trial Counsel would have discovered this and used it to impeach Wilson's credibility at trial if Trial Counsel had adequately investigated.[4] Davisson also argued that

[4] The State did not object at the hearing, and makes no argument on appeal, that this purported evidence was improperly designated to the post-conviction court or that it was inadmissible.

Trial Counsel's decisions regarding his failure to call a false confession expert, to fail to object to K.D.'s testimony and to the prosecutor's opening statements, and to investigate Wilson "may have been some type of a theory that [Trial Counsel] had in this case" and that an evidentiary hearing and Trial Counsel's testimony was required to show that Davisson could meet *Strickland*'s standards. (PCR Tr. p. 31).

[9] On April 8, 2022, the post-conviction court entered its detailed findings of fact and conclusions of law thereon denying Davisson relief. The post-conviction court found that it had considered the trial record and Davisson's petition. The post-conviction court addressed the merits of each of Davisson's claims for relief under *Strickland* but did not address Davisson's contention that Trial Counsel's testimony was required to resolve his claims. The post-conviction court acknowledged that Davisson had attempted to make a showing that there were matters outside the trial record that he purported were meaningful for potential cross-examination of Wilson, but the post-conviction court found that it disagreed with Davisson's contentions.

[10] Davisson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[11] Davisson appeals following the post-conviction court's grant of summary disposition pursuant to Indiana Post-Conviction Rule 1(4)(g), which provides

that a court may grant summary disposition of a petition for post-conviction relief

> when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The post-conviction court may hold oral argument on a request for disposition under Post-Conviction Rule 1(4)(g), and "[i]f an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible." *Id*. We review a post-conviction court's disposition under Post-Conviction Rule 1(4)(g) as we would the grant or denial of a motion for summary judgment. *Allen v. State*, 791 N.E.2d 748, 753 (Ind. Ct. App. 2003)*, trans. denied*. That is, "[w]e face the same issues that were before the post-conviction court and follow the same process." *Id*. Summary disposition is not merited unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. "'A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.'" *Abbott v. State*, 183 N.E.3d 1074, 1079 (Ind. 2022); *see also Brandon v. State*, 264 Ind. 177, 180, 340 N.E.2d 756, 758 (1976) (holding that a fact is 'material' "if it tends to facilitate resolution of any of the issues either for or against the party having the burden of persuasion on that issue."). As the appellant, Davisson has the burden of persuasion to show that the post-conviction court erred in granting summary

disposition. *See Allen,* 791 N.E.2d at 753; *see also Trueblood v. State*, 715 N.E.2d 1242, 1260 (Ind. 1999) (holding that the reviewing court will carefully assess the post-conviction court's decision to ensure that the nonmoving party was not denied his day in court, but that the court will affirm if the nonmovant points to no genuine issues of material fact).

II. *Waiver*

[12] We first address the State's argument that Davisson has waived his appellate claims by failing to present this court with an adequate record to review the post-conviction court's findings and conclusions. Drawing our attention to its designation of portions of the trial record in support of its motion for summary disposition and the post-conviction court's reliance upon the trial record in granting that motion, the State contends that Davisson waived his claims because he did not request that the record of his criminal trial be transferred into the instant appeal.

[13] Both Davisson and the State requested that the post-conviction court take judicial notice of the trial record of his underlying convictions, Davisson in a written motion prior to the summary disposition proceedings and the State at the summary disposition hearing. The post-conviction court was required to take judicial notice of the trial court record in light of these requests. *See* Ind. Evidence Rule 201(b)(5) and (c)(2) (providing that a court may take judicial notice of the records of an Indiana court and that it must do so "if a party requests it and the court is supplied with the necessary information."). As the State correctly points out, in *Horton v. State*, 51 N.E.3d 1154, 1162 (Ind. 2016),

our supreme court acknowledged that, in light of Indiana Appellate Rule 27 which provides that the record on appeal includes "all proceedings before the trial court . . . whether or not . . . transmitted to the [c]ourt on [a]ppeal[,]" once a trial court takes judicial notice of a court record, it is part of the record on appeal. The *Horton* court held that the better practice would be for the trial court to enter the judicially noticed material into the record in order to facilitate appellate review, and that, while the *Horton* court had obtained copies of certain judicially noticed material from the trial court clerk in order to resolve Horton's appeal, a reviewing court is under no duty to request these additional materials and acts within its discretion if it attempts to decide the case without the benefit of the judicially noticed records. *Id*. The *Horton* court observed that Indiana was then in the process of implementing a unified statewide electronic case management system (CMS) that would put court records at the fingertips of any court or litigant. *Id*. at 1161-62. The court went on to explain that it had procured copies of the records at issue in Horton's appeal only to illustrate "the availability of procedures best employed by the affected parties when a court takes judicial notice [without making the material part of the record]–and before a unified statewide CMS largely moots these concerns." *Id*. at 1162.

[14] The days predicted by the *Horton* court have come to pass in that Indiana's unified CMS makes the records of trial court proceedings readily available to this court. Here, the State does not contest that the post-conviction court properly took judicial notice of the trial record and that, pursuant to Indiana Appellate Rule 27, the trial record is part of the record on appeal, regardless of

whether Davisson requested that the trial record be transferred into this appeal. This court had access to the trial transcript through Davisson's direct appeal records available on the unified Indiana CMS. Therefore, although it remains the best practice for an appellant to have such materials transferred into the appellate proceedings, we find that Davisson has not waived his claims by failing to present this court with an adequate record.

II. *Factual Disputes Precluding Summary Disposition*

[15] Davisson raised four grounds of ineffective assistance of Trial Counsel. A petitioner for post-conviction relief asserting ineffective assistance of trial counsel 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 v. State*, 109 N.E.3d 978, 983 (Ind. 2018) (citing *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012), in turn citing *Strickland*, 466 U.S. at 687). Counsel for a criminal defendant enjoys a strong presumption in his or her favor that assistance was rendered effectively and that all significant decisions were made in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690.

[16] Here, we agree with Davisson that there are genuine issues of material fact to be resolved by the factfinder that precluded summary disposition of his petition. As a global matter, Davisson alleged in his petition for post-conviction relief and at the oral argument below that the choices made by Trial Counsel were deficient and were not made as part of a reasonable trial strategy. These allegations were material to the first prong of *Strickland* to rebut the

presumption of effectiveness accorded to Trial Counsel and necessitated a factual determination of what strategy Trial Counsel actually pursued at trial.

[17] The State asserted a general denial to the factual allegations contained in Davisson's petition for post-conviction relief. At the oral argument on its motion for summary disposition, the State argued that it did not dispute some of the factual matters asserted by Davisson in his petition, but it did not retract its general denial of all of the material facts recited by Davisson in his petition. The State did not specifically address the issue of Trial Counsel's strategy as alleged by Davisson except to imply that Trial Counsel had deployed a good strategy by not inquiring further into Wilson's training and experience, an argument that further put the matter in dispute. Therefore, we conclude that summary disposition was not merited based on Davisson's allegations pertaining to Trial Counsel's trial strategy on the issues raised in his petition for post-conviction relief. *See Sherwood v. State*, 453 N.E.2d 187, 189 (Ind. 1983) (reversing the summary disposition of Sherwood's petition for post-conviction relief where the State's general denial of the factual allegations contained therein created a factual dispute to be resolved at a hearing).

[18] In addition, Davisson alleged in his petition that, but for Trial Counsel's failure to use a false confession expert, he would not have testified at his criminal trial. The State entered a general denial to that factual assertion. The State further responded that, to the contrary, Davisson had "not [been] backed into a corner whereby he had to waive his 5th Amendment right against self-incrimination" due to Trial Counsel's failure to call the expert, thus putting the factual question

of a matter relating to Davisson's claim of prejudice on this issue in dispute. (Appellant's App. Vol. II, p. 102).

[19] We also observe that the State acknowledged below that Davisson's claim of prejudice resulting from Trial Counsel's failure to investigate and cross-examine Wilson required him to show what would have been gained thereby. *See McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013) ("This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result."). Therefore, Davisson was required to introduce matters outside of the trial record. As part of his response to the State's motion for summary disposition, Davisson designated evidence that he contended could have been used to impeach Wilson and that was material to his claim of prejudice, showing that there were genuine issues of material fact to be resolved on this issue. Davisson was entitled to a hearing to introduce this evidence and have the factfinder resolve the dispute.

[20] In reaching our conclusions today, we express no opinion on the ultimate merit of Davisson's claims. We also acknowledge that we accord greater than usual deference to a post-conviction court's findings and conclusions where, as here, the post-conviction judge also presided over the criminal trial. *See id*. at 200. However, the matter before us is whether genuine issues of material fact exist precluding summary disposition of Davisson's petition for post-conviction relief, and we conclude that there are.

CONCLUSION

[21] Based on the foregoing, we conclude that genuine issues of material fact exist as to Davisson's asserted claims for post-conviction relief and that the State was, therefore, not entitled to summary disposition as a matter of law.

[22] Reversed and remanded for further proceedings.

[23] Bailey, J. and Vaidik, J. concur