[Cite as *State v. Woodford*, 2018-Ohio-5398.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TY E. WOODFORD,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 NO 0458

Criminal Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 216-2002

BEFORE:
Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Kelly A. Riddle, Prosecuting Attorney, Noble County Prosecutor's Office 150 Courthouse, Caldwell, Ohio 43724, for Plaintiff-Appellee and

Atty. W. Joseph Edwards, *Atty. Stephen E. Palmer*, 511 South High Street, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: December 21, 2018

Robb, P.J.

{¶1} Defendant-Appellant Ty E. Woodford appeals the decision of the Noble County Common Pleas Court denying his petition for post-conviction relief. He contends his petition set forth sufficient operative facts to entitle him to an evidentiary hearing on his claim of ineffective assistance of trial counsel for not investigating and presenting the testimony of a witness subpoenaed by the state but not called to testify at trial. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} Due to police observations in a garage at Appellant's Caldwell residence on December 10, 2015, Appellant was indicted on three drug counts: (1) complicity in the illegal manufacture of drugs in violation of R.C. 2925.04(A), a first-degree felony due to the drug being methamphetamine (meth) and the offense being committed in the vicinity of a juvenile; (2) illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), a second-degree felony due to the offense being committed in the vicinity of a juvenile; and (3) knowingly permitting felony drug abuse on real estate, in violation of R.C. 2925.13(B), a first-degree misdemeanor.

{¶3} At trial, two deputies from the Noble County Sheriff's Department testified to receiving a report that a stolen vehicle was located at Appellant's residence. When they pulled in the driveway, Appellant was standing by his truck which was parked near a detached garage. Appellant was holding a file, explained he was using it to sharpen his chainsaw, and said he was retrieving tools from his truck. (Tr. 26, 28, 51). There was no garage door on the garage, which allowed the officers to see a yellow 1971 Fleetside truck matching the description of the stolen vehicle. (Tr. 26, 27, 40). When the officers advised Appellant of this fact and of his rights, Appellant signed a consent form allowing the officers to search the garage. (Tr. 26, 51).

{¶4} Appellant told the officers William Cool was working on the truck. (Tr. 37). At this point, Cool walked out of the garage. He was secured in the cruiser, and the officers entered the garage. (Tr. 27). As the officers approached the truck in the garage, they noticed a strong chemical smell, which they both recognized as the smell of a meth lab. (Tr. 28, 51). Two men (Randy and Bryan) then emerged from a room in

the back left corner of the garage. The officers secured the two men and re-entered the garage. (Tr. 27). When they reached the back left corner, they observed items which appeared to be part of a meth lab. (Tr. 27-28, 52). In this area, they also noticed a chainsaw on a stool which appeared as if someone had been working on it. (Tr. 28-29, 52). For safety reasons, the officers vacated the garage and called a special task force with expertise in neutralizing the volatile chemicals involved in making meth. (Tr. 29-30). Thereafter, they noticed various items used in making meth were scattered throughout the garage. (Tr. 42-43).

{¶5} The first deputy testified that after he confronted Appellant with his observations, "[Appellant] stated he felt there was a small shake and bake but it was not his. He said it was Mr. Cool's. * * * He said he had seen one which he referred to as a shake and bake." (Tr. 28, 48). The officer explained the phrase "shake and bake" is the slang term for the type of meth lab involved. (Tr. 28). When the other deputy was asked if Appellant made any statements to him acknowledging the lab, he responded, "He said he wouldn't know what it looked like." (Tr. 53).

{¶6} A lieutenant with the special task force testified he was trained to disassemble and neutralize the components of a meth lab. He confirmed the meth-making involved was called the "one pot shake and bake method." (Tr. 67). He explained the steps and supplies involved. For instance, the meth is cooked in a bottle (or reaction vessel) via a chemical reaction triggered by fluids and the lithium removed from batteries. During the violent reaction, sparks can be observed in the reaction vessel and pressure builds during the process which must be released to avoid an explosion. (Tr. 68, 110). He described how evidence of the supplies for each step was recovered from the scene. He said it takes 1-1.5 hours to make a batch of meth. (Tr. 92). The batch recovered was not fully ready for consumption as the meth powder had not yet been extracted from the meth oil with one of the hydrogen chloride gas generators he found. (Tr. 110). He testified to lab results confirming the presence of 26.4 grams of meth in one of the reaction vessels. (Tr. 71).

{¶7} A detective testified a woman and her children (ages 15 and 16) were present in the house when he and the sheriff arrived that night. (Tr. 57, 60). He testified the house was within 100 feet of the garage, approximating it was 75 feet away, noting one could see into the garage from the house. He also explained there were

items, including bottles with protruding tubes, "laying everywhere" that were observable upon entering the garage (and were not solely in the back room). (Tr. 51).

{¶8} William Cool testified he pled guilty to a drug charge arising from this incident and was serving a four-year sentence. He said Appellant was a friend he knew for many years. He arrived at Appellant's house the day before the police arrived as he was working on the stolen truck. (Tr. 118). He disclosed Appellant, Randy, and Bryan were in the garage with him while the meth was being manufactured, saying they were all aware it was being made. (Tr. 119). Cool said he would shake the bottle and then Bryan would shake it while Cool worked on the truck. (Tr. 121). Cool claimed he promised Appellant half of a gram of meth if he helped with the stolen truck. (Tr. 128).

{¶9} Cool said they brought Randy to Walmart to get a box of Claritin-D earlier that day and the remaining materials were already at Appellant's garage. (Tr. 119-120). He testified Appellant previously went to a store and charged to his account certain materials for making meth, such as muriatic acid and lye. (Tr. 120). When asked who was at the residence, Cool answered it was him, Appellant, Randy, Bryan, Appellant's "old lady", and her minor children; he saw the children in the house and in the yard while he was there. (Tr. 121). He explained he did not provide the police with all of this information on the night of his arrest because he was high and did not know his accomplices "turned on" him. (Tr. 122-123, 128).

{¶10} The jury found Appellant guilty of the three offenses charged. At sentencing, the state agreed the offenses merged as they were allied offenses of similar import and elected to proceed on the first-degree felony. In an August 9, 2016 entry, the court sentenced Appellant to eight years in prison and imposed a $20,000 fine. The court refused to order forfeiture of Appellant's real property.

{¶11} A timely notice of appeal was filed. The transcript of proceedings on appeal was filed on September 29, 2016. With a new attorney representing him on appeal, Appellant raised issues pertaining to the sufficiency and the weight of the evidence. This court affirmed the trial court's judgment. *State v. Woodford*, 7th Dist. No. 16 NO 0436, 2017-Ohio-4288.

{¶12} On September 28, 2017, Appellant filed a timely petition for post-conviction relief. *See* R.C. 2953.21(A)(2) (a timely petition must be filed no later than 365 days after the date the trial transcript is filed in the court of appeals in the direct

appeal of the judgment of conviction). He argued his trial attorney rendered ineffective assistance of counsel by failing to fully investigate and interview Bryan.[1] He stated the information being relied upon was not in the trial record and thus the issue could not have been raised on appeal.

{¶13} Appellant attached to his petition a document purporting to be a report of the Noble County Sheriff's Office from an interview with Bryan occurring within hours of the arrests at Appellant's garage. This report summarized Bryan's statement as follows: Cool was in the back of Appellant's garage making meth; he saw Cool alternate between shaking the bottle and working on a truck; Appellant was in the room with Cool while Cool was shaking the bottle; and Appellant told Cool not to make meth in his garage but did not stop Cool or the process. Appellant's petition states his trial counsel received this report in discovery.

{¶14} Attached to Appellant's petition was the affidavit and curriculum vitae of a private investigator who visited Bryan in jail on September 20, 2017 with Appellant's post-conviction attorney. The private investigator was a retired police officer. His affidavit reported that Bryan told him: he was willing to testify for Appellant; he was not interviewed by defense counsel; he would have testified that Cook was the only person cooking meth on December 10, 2015; he was also with Appellant earlier in the day; he never saw Appellant cook meth or buy/supply chemicals; Cool arrived with his meth cooking equipment shortly before the police arrived; when Appellant saw Cool cooking meth in his garage, Appellant "flipped out" and told Cool to stop; and the detectives knew the meth lab on Appellant's property was operated by Cool without Appellant's involvement. The private investigator's affidavit also disclosed that Bryan refused to sign a statement "because of pending charges."

{¶15} The state filed a motion to dismiss and an answer to Appellant's post-conviction relief petition, arguing the decision on whether to call a witness is a tactical one which should not be second-guessed. It was noted the state subpoenaed Bryan

[1] The petition also claimed counsel did not adequately cross-examine Cool about his criminal record or his deal with the prosecution. It also set forth a brief, potential argument on prosecutorial misconduct *if* the state failed to produce unnamed evidence bearing on Cool's credibility. The state responded by pointing out this witness was asked about his guilty plea arising out of this incident and about his criminal record. (Tr. 117, 123-127, 131). A June 29, 2016 judgment entry shows the parties agreed the state divulged any consideration and promises to prosecute witnesses in exchange to aid or testimony. In any event, these arguments are not maintained on appeal.

but then did not call him, which the defense knew as the opening statement of both sides mentioned Bryan would be a witness. (Tr. 14, 22). The state's response to Appellant's petition said (without an affidavit) a decision was made to refrain from calling Bryan to the stand due to information received on the day of trial combined with Bryan arriving late and voicing he did not want to testify. The state also suggested the issue could have been raised on appeal.

{¶16} Appellant filed a memorandum in opposition to the state's motion to dismiss his petition. He pointed out the issue could not have been raised on appeal as the content of Bryan's statement was necessary to establish deficient performance and prejudice but was not in the trial record. He said his attorney knew of the importance of Bryan's testimony, asserting he would have refuted Cool's testimony which incriminated Appellant as complicit in manufacturing and in assembly of chemicals for manufacturing (even if it may not have assisted with the misdemeanor offense of knowingly permitting felony drug abuse on real estate).

{¶17} On December 19, 2017, the trial court denied Appellant's petition for post-conviction relief finding no deficient performance by trial counsel or prejudice. The court stated: Bryan was Appellant's co-defendant; his statement in the report "cuts two ways" as it claims Appellant told Cool not to make meth in his garage but did not stop Cool from doing so; the affidavit of the private investigator was hearsay from Bryan who would not put the information in writing due to "pending charges"; and if these pending charges prevented him from committing his information in writing, it was unlikely he would have testified. The within appeal followed.

ASSIGNMENT OF ERROR

{¶18} Appellant's sole assignment of error provides:

"THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S CLAIM FOR POST-CONVICTION RELIEF UNDER R.C. 2953.21 BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL, THEREBY VIOLATING APPELLANT'S RIGHTS UNDER THE [CONSTITUTION]."

{¶19} Pursuant to R.C. 2953.21(A)(1)(a), a person who has been convicted of a criminal offense and who claims there was such an infringement of his constitutional rights that the judgment is void or voidable may file a petition in the court that imposed sentence which states the grounds for relief and asks the court to vacate the judgment

or grant other appropriate relief. "Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief." R.C. 2953.21(D). *See also* R.C. 2953.21(F) (the court need not proceed to a hearing on the issue if the petition and the files and records of the case show the petitioner is not entitled to relief). "In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript." R.C. 2953.21(D).

{¶20} In accordance, a hearing is not automatic. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999). The trial court has "a gatekeeping role as to whether a defendant will even receive a hearing" on a post-conviction petition, and the trial court's decision on whether to grant a hearing is subject to an abuse of discretion review. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 51, citing *Calhoun*, 86 Ohio St.3d 279. A trial court can deny a petition for postconviction relief without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief," i.e., the submissions do not establish the conviction is voidable (or void) due to an infringement of constitutional rights. *Calhoun*, 86 Ohio St.3d at 282-283.

{¶21} The trial court can require the petitioner to show the claimed errors resulted in prejudice before a hearing is scheduled. *Id.*, citing *State v. Jackson*, 64 Ohio St.2d 107, 112, 413 N.E.2d 819 (1980). Prior to any hearing on a petition raising ineffective assistance of trial counsel, "the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *Jackson*, 64 Ohio St.2d 107 at syllabus.

{¶22} The standard two-part test for ineffective assistance of counsel requires a defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Both prongs must be established; if the performance was not deficient, then there is no need to review for prejudice, and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶23} In evaluating the alleged deficiency in performance, our review is highly deferential to trial counsel's decisions; there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at 142-143, citing *Strickland*, 466 U.S. at 689. We are to refrain from second-guessing the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Instances of debatable trial strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). There are "countless ways to provide effective assistance in any given case." *Bradley*, 42 Ohio St.3d at 142, citing *Strickland*, 466 U.S. at 689.

{¶24} To show prejudice, a defendant must prove his lawyer's errors were so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶25} Appellant contends he set forth sufficient operative facts to establish ineffective assistance of trial counsel in order to warrant a new trial or at least an evidentiary hearing. He concludes trial counsel was ineffective by "failing to interview, investigate, and call a key witness at trial to establish the only viable theory of defense."

{¶26} As to the allegations of insufficient investigation regarding Bryan's potential testimony, Appellant's brief concedes his trial attorney received discovery of Bryan's statement. In addition, various filings demonstrate counsel's knowledge of Bryan's statement and his preparation for Bryan's anticipated testimony. Defense counsel filed a motion in limine on February 8, 2016 regarding the out-of-court statements of Bryan and others to law enforcement about Appellant's location and knowledge of events on the day in question. Another motion filed the same day sought

information on the deal the state entered with Bryan and referenced the anticipation that Bryan would testify for the state in Appellant's case. On June 30, 2016, counsel filed a motion for a jury instruction on co-defendant testimony before Cool, Randy, and Bryan testified. Also, the state issued a subpoena for Bryan on July 7, 2016, and the return on the subpoena was filed in this case on July 12, 2016. Bryan's anticipated status as a testifying witness was also mentioned in the opening statements presented by the prosecution and by the defense.

{¶27} There is no indication counsel rendered ineffective assistance of counsel by failing to investigate Bryan's potential testimony. Rather, the record shows counsel reviewed the statements Bryan made to the officers after his arrest. In fact, counsel's motion for extraordinary attorney's fees, filed in the record of this case on August 12, 2016, speaks of counsel's work on discovery and the state's disclosures regarding witnesses as the July 18, 2016 trial date neared. Counsel's attached itemization lists the time spent on July 8, 2016 reviewing statements and preparing for cross examination of witnesses and the time spent on July 13, 2016 conducting a "review of transcripts of recorded statements of [Randy] and [Bryan]" and preparation for cross examination of these two witnesses. (This itemization was attached to the motion and to the court's August 23, 2016 judgment entry granting the motion.)

{¶28} The record shows counsel received Bryan's statements to police in discovery, considered the effect on the case, and filed motions regarding Bryan's statements. The information relayed by the private investigator's affidavit was not substantially more detailed than Bryan's statements to police. Under the totality of the circumstances of this case, the alleged failure to interview a co-defendant with a pending plea deal where his statements were reviewed prior to trial and he was subpoenaed as a witness by the state was not some serious error that fell below an objective standard of reasonable representation and/or undermines confidence in the outcome of the proceedings.

{¶29} We turn to the contention that trial counsel should have called Bryan as a witness after the state made a mid-trial decision to refrain from calling this subpoenaed witness. Appellant believes Bryan's testimony would have been exculpatory as to the charge of complicity to manufacturing and illegal assembly or possession of chemicals. He states the testimony would have countered the testimony of Cool whose testimony

incriminated Appellant. He argues the failure to ensure the presentation of Bryan's testimony was inexplicable and deprived him of a substantial defense. He concludes the trial court failed to give due deference to the contents of the private investigator's affidavit which relayed what Bryan told him, arguing any suspicion the court had as to credibility should have been resolved at a hearing on his post-conviction relief petition.

{¶30} "Where a petitioner relies upon affidavit testimony as the basis of entitlement to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential." *Calhoun*, 86 Ohio St.3d at 284. Furthermore, the trial court is not required to accept affidavits as true. *Id.* at 283-284. "[A] trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact. To hold otherwise would require a hearing for every postconviction relief petition." *Id.* at 284.

> Unlike the summary judgment procedure in civil cases, in postconviction relief proceedings, the trial court has presumably been presented with evidence sufficient to support the original entry of conviction, or with a recitation of facts attendant to an entry of a guilty or no-contest plea. The trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant. That conclusion is supported by common sense, the interests of eliminating delay and unnecessary expense, and furthering the expeditious administration of justice.

Id.

{¶31} When reviewing a decision on the credibility of statements in an affidavit attached to a petition for post-conviction relief in order to determine whether a hearing is warranted, the court considers all relevant factors, including but not limited to: whether the judge reviewing the postconviction relief petition also presided at the trial; whether multiple affidavits contain nearly identical language or otherwise appear to have been drafted by the same person; whether the affidavits contain or rely on hearsay; whether the affiant is related to the petitioner or otherwise interested in the success of the

claims; whether the affidavit contradicts evidence proffered by the defense at trial; whether the affidavit contradicts evidence in the record by the same witness; and whether the affidavit is internally inconsistent. *Id.* at 285. "Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court." *Id.*

{¶32} Here, the affidavit attached to the petition was that of the private investigator working for Appellant. The investigator was merely reiterating hearsay statements he heard from the person arrested with Appellant who was later interviewed in jail and who refused to sign an affidavit swearing that his allegations were true (which he claimed was due to the fact that he had pending charges). The *Calhoun* factors are used to judge the weight or credibility to assign to information in an affidavit. Yet, the credibility of the *affiant* is not necessarily the issue here. A key issue is that the affidavit contains no information pertinent to Appellant's trial except hearsay from a witness whose testimony is said to be outcome determinative. As stated in *Calhoun*, the existence of only one factor (whether listed in that case or otherwise found to be relevant) may be sufficient for the trial court to discount the information in an affidavit depending on the totality of the circumstances in the case. *Calhoun*, 86 Ohio St.3d at 285. The extent the affidavit relies on hearsay is a *Calhoun* factor weighing heavily against Appellant.[2]

{¶33} Furthermore, the purported potential testimony of Bryan was not as exculpatory as Appellant portrays it. That Bryan never saw Appellant buy chemicals or supply them to Cool does not mean Appellant never did so. His statement that "the detectives knew" it was only Cool who was involved in operating the meth lab is speculative, argumentative, and based on his opinion of what the police should have concluded. A statement that he was with Appellant earlier on December 10, 2015 and

[2]The affidavit's recitation of the hearsay statements attributed to Bryan also contained a hearsay statement allegedly made by Appellant in Bryan's presence. Appellant believes it is reasonably probable the result of trial would have been different if Bryan testified because he would have said he heard Appellant tell Cool to stop making meth. We note the state can introduce a defendant's own statements under Evid.R. 801(D)(2), entitled "Admission by Party-Opponent," which provides a statement is not hearsay if it is "a statement is offered against a party and is (a) the party's own statement * * *." Evid.R. 801(D)(2)(a). However, a defendant cannot use this rule to introduce hearsay evidence of his own statement. Appellant does not explain what hearsay exception would have allowed him to introduce his own allegedly exculpatory statement through Bryan's testimony. *See generally State v. DeSarro*, 7th Dist. No. 13 CO 39, 2015-Ohio-5470, ¶ 22 (if the defendant seeks to offer an exculpatory statement he made to police, the statement is by definition hearsay under Evid.R. 801(C) and the defendant must establish it falls within an exception to the hearsay rule).

Cool arrived shortly before the police is not dispositive. There was no allegation the batch of meth discovered by police had been cooking for long. Moreover, Appellant admitted to officers that he had just alighted *from his garage* (where Cool was cooking the meth and which smelled strongly of the meth-making process), and Appellant told the officers he had been sharpening his chainsaw (which was on a stool in the back room of the garage near items used in making meth).

{¶34} Bryan's potential testimony that only Cool was cooking meth on December 10, 2015 (thereby claiming Appellant was not personally cooking meth that day) does not destroy Cool's credibility as to Appellant's complicity. For instance, Cool did not testify *Appellant* personally cooked the meth or shook the bottle. In fact, Cool admitted he shook the bottle himself, assisted by *Bryan* who also shook the bottle. On the subject of the credibility of the statements within the affidavit, Bryan thus had a strong incentive to say Cool was the only person cooking meth. He could be seen as interested in the success of Appellant's defense and in his own reputation and charges, which is another consideration under *Calhoun*.

{¶35} This incentive to provide a statement that Cool acted alone would also extend to Bryan's anticipated testimony that Appellant "flipped out" when he saw Cool cooking meth in his garage and told him to stop. And as to this statement and Bryan's earlier statements to law enforcement, Appellant did not eject Cool from his garage or otherwise attempt to stop him from making meth on his property. (The statement could also be interpreted to mean Appellant did not wish the dangerous process to occur *within* the garage; we note there was evidence recovered outside of the garage as well as inside.)

{¶36} In any event, one need not believe Bryan's claim. As to the credibility of the hearsay within the affidavit, the trial court found the refusal to sign a statement decreased the likelihood he would testify in accordance with the hearsay. Plus, this judge was the same one who presided over Appellant's trial. He heard Cool testify and could weigh the effect Bryan's additional information would have had on the verdict. The court's decision as to the contents of the affidavit was not unreasonable, arbitrary, or unconscionable. Additionally, even if the lack of Bryan's testimony had some conceivable effect on Cool's credibility, the result of the proceeding was not unreliable or the proceeding fundamentally unfair; "[i]t is not enough for the defendant to show that

the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693; *Carter*, 72 Ohio St.3d at 558, citing *Lockhart*, 506 U.S. at 369.

{¶37} Finally, it is rational for a court to consider it a strategic trial decision to refrain from calling Bryan as a defense witness after learning mid-trial that he would not be testifying for the state as anticipated, especially after hearing the testimony presented by Cool. Via his demeanor, voice inflection, gestures, eye movements, etc., Cool may have portrayed himself as a credible witness while testifying before the jury, notwithstanding a felony record and a plea with the state. Defense counsel saw him testify and could gauge the jury's reaction to him. Cool willingly incriminated himself in the theft of a truck and the manufacturing of meth. He was not merely there to incriminate others. Moreover, he testified *Bryan* took turns shaking the bottle with him. Counsel may have tactically decided he would rather not call Bryan as a defense witness due to such allegation, which may have sounded credible since Cool did not add a claim that Appellant shook the bottle. Therefore, in addition to a lack of prejudicial effect, the trial court could reasonably find the matter did not constitute a deficiency in the performance of trial counsel. A hearing on the petition would not change such a conclusion.

{¶38} For the foregoing reasons, Appellant's assignment is overruled, and the trial court's judgment is affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.