NO. TSR CV22-5001181-S : STATE OF CONNECTICUT

STATE OF CONNECTICUT
SUPERIOR COURT
G.A. 19

AUSTIN HAUGHWOUT : SUPERIOR COURT

2024 JUN -4 A 9:37

v. : JUDICIAL DISTRICT OF TOLLAND
AT ROCKVILLE

COMMISSIONER OF CORRECTION : JUNE 4, 2024

Memorandum of Decision

The habeas corpus petitioner, Austin Haughwout, was convicted in a joint trial before a jury in 2018, in the first case of interfering with a police officer and disobeying the direction of an officer in a motor vehicle and, in the second case, of two counts of assault on a police officer and one count of interfering with an officer. The trial court, *Suarez, J.,* vacated the interfering conviction in the second case and, in January 2019, sentenced the petitioner on the remaining counts to a net effective sentence of seven years in prison suspended after one year, with five years probation to follow.

On appeal, the Supreme Court vacated the convictions in the first case, which had stemmed from an incident on July 19, 2015, and, in the second case, which stemmed from a July 22, 2015 incident, affirmed the conviction on one count of assault on a police officer and reversed and remanded the conviction on the other assault on a police officer count. *State v. Haughwout*, 339 Conn. 747, 262 A.3d 791 (2021). The count that the Court affirmed involved the petitioner's assault of Officer James DePietro, Jr., at the Clinton police department on July 22, 2015. Id., 753-56, 775. The count that the court reversed, due to an instructional error, involved an alleged assault on Clinton Officer

Christopher Varone at the same time and place. Id. The Court found that the jury could reasonably have determined that the petitioner engaged in a fight with the officers in the lobby of the Clinton police station in which the petitioner was "flailing about," "kicking," and "struggling," and that several officers then had to carry the petitioner to the booking area. Id., 754, 766.

On remand, the state did not prosecute the second count of assault on a police officer involving Officer Varone. The petitioner served the one year prison sentence on the remaining assault on a police officer conviction, involving Officer DePietro, and is now on probation. The petitioner nonetheless seeks a new trial on the assault on a police officer conviction involving Officer DePietro.[1] In his habeas petition and at the hearing, the petitioner has raised two categories of claims: claims under *Brady v. Maryland,* 373 U.S. 83, 87 (1963), and claims of ineffective assistance of trial and appellate counsel.[2]

I. The *Brady* Claims

The petitioner's *Brady* claims are that the state failed to disclose recordings of the petitioner's encounters with the Clinton police on July 19 and September 4, 2015. Under

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[1]Because the petitioner was in prison when he filed his petition and because he remains on probation, the petitioner is in custody within the meaning of the jurisdictional statute; General Statutes § 52-466 (a) (1); and the court therefore has subject matter jurisdiction. See *Richardson v. Commissioner of Correction*, 298 Conn. 690, 696-98, 6 A.3d 52 (2010). The court nonetheless advised the petitioner at the habeas trial that, if he prevails, he could be retried on the assault on a police officer charge and possibly sent back to prison. The petitioner nonetheless wished to go forward with the habeas case.

[2]The court considers claims raised in the petition but not briefed by the petitioner in his posttrial brief to be abandoned. See *Raynor v. Commissioner of Correction*, 117 Conn. App. 788, 796-97, 981 A.2d 517 (2009), cert. denied, 294 Conn. 926, 986 A.2d 1053 (2010).

Brady, it is the petitioner's burden to prove "(1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material...." (Internal quotation marks omitted.) *State v. Ouellette*, 295 Conn. 173, 185, 989 A.2d 1048 (2010). Because a *Brady* claim is one that the petitioner could have raised on appeal but did not do so here, the respondent has raised the defense that the petitioner has deliberately bypassed his appellate remedies. (Return, pp. 4-6). To overcome this sort of procedural default, the petitioner must prove both cause for and prejudice from the default. See *Arroyo v. Commissioner of Correction*, 172 Conn. App. 442, 462, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017).

At the hearing, the petitioner claimed that the cause of the default was ineffective assistance of counsel. However, as the petitioner also stated at the hearing, his trial counsel in 2017, Attorney Jon Schoenhorn, made a pretrial request of the state for disclosure of documents. Given that counsel made that request, the court cannot see any other way in which trial counsel could be at fault for failure of the state to disclose evidence under the *Brady* rule.[3] Although it is conceivable that appellate counsel,

[3]The petitioner also states in his petition that, apparently when representing himself in the early stages of the case, "he had requested discovery, including the various audio and audio/video recordings in possession of the state and/or law enforcement from both incidents of July of 2015 as well as from a September 4, 2015 incident which was not ... a subject of this trial." (Petition, p. 3.) This request completely overlaps what the petitioner now claims the state failed to honor. Given the request that both he and his attorney made for these materials, it is even more clear that any fault for any failure to disclose falls on the state, not the defense or defense counsel.

Supervisory Assistant Public Defender Jennifer Bourn, could be at fault because she did not raise the claim on appeal, here appellate counsel raised numerous claims that proved successful on appeal. The petitioner did not call appellate counsel as a witness and thus has not overcome the presumption that, especially given that success, appellate counsel "is not under an obligation to raise every conceivable issue." (Internal quotation marks omitted.) *Valentine v. Commissioner of Correction*, 219 Conn. App. 276, 289, 295 A.3d 973, cert. denied, 348 Conn. 913, 303 A.3d 602 (2023). Accordingly, the court finds that the petitioner has not met his burden of proving both cause and prejudice and that the *Brady* claim is procedurally defaulted.

In any event, on the merits the *Brady* claim is wholly without substance. At the habeas hearing, the petitioner admitted that the state did not have possession of the July 19 materials and some of the September 4 materials. As to these materials, the state obviously did not suppress or fail to disclose anything under *Brady*. Further, as to the July 19 materials, the issue of nondisclosure is moot because of the Supreme Court order vacating the petitioner's conviction concerning the events of that day.

The petitioner also claims that there were additional videos taken by him from his own car on September 4 that the police obtained and that the state failed to disclose. These videos, according to the petitioner, related to the behavior of Officer Varone. Because the September 4 videos related to the actions of an officer other than DePietro, who was the victim of the only count that the petitioner challenges, and because the videos took place on an entirely different day than the July 22 incident at issue in this

case, the court excluded them as irrelevant at the habeas hearing. The court now finds for the same reasons that they are not favorable to the defense in this case and that they are not material in the sense that they would " undermine confidence in the verdict." (Internal quotation marks omitted.) *State v. Rosa*, 196 Conn. App. 480, 503, 230 A.3d 677, cert. denied, 335 Conn. 920, 231 A.3d 1169 (2020). For these reasons, the court denies the *Brady* claims on the merits.

II. Ineffective Assistance of Counsel

The petitioner also claims ineffective assistance of trial counsel, Attorney Jon Schoenhorn, and appellate counsel, Supervisory Assistant Public Defender Jennifer Bourn. The claims stem from Schoenhorn's alleged failure to supply an evidentiary basis for, and both Schoenhorn's and Bourn's alleged failure to provide an adequate legal argument for, an instruction requiring the state to prove that the petitioner was the proximate cause of Officer DePietro's injuries.

Under *Strickland v. Washington,* 466 U.S. 668 (1984), a criminal defendant seeking habeas relief for ineffective representation of trial counsel must prove two elements. "First, the defendant must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *Maia v. Commissioner of Correction*, 347 Conn. 449, 460, 298 A.3d 588 (2023). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must

overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy ... Furthermore, the right to counsel is not the right to perfect counsel." (Citations omitted; internal quotation marks omitted.) *Foster v. Commissioner of Correction*, 217 Conn. App. 658, 667–68, 289 A.3d 1206, cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023).

Second, the defendant must show that "the deficient performance prejudiced the defense." (Internal quotation marks omitted.) *Maia v. Commissioner of Correction*, supra, 347 Conn. 460. "To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Jordan v. Commissioner of Correction*, 341 Conn. 279, 287, 267 A.3d 120 (2021).

It is well settled that "[a] court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." (Internal quotation marks omitted.) *Hickey v. Commissioner of Correction*, 329 Conn. 605, 618, 188 A.3d 715 (2018). As stated in *Strickland*, a court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies." *Strickland v. Washington*, supra, 466 U.S. 697.

The court, upon examination, finds no merit to the petitioner's ineffective assistance of counsel claims. Initially, the claim that Schoenhorn did not examine the witnesses properly to elicit a factual basis for the petitioner's proposed jury instruction is

not the type of claim that a habeas court normally recognizes. As the Appellate Court has stated: "[a]n attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy." (Internal quotation marks omitted.) *Antonio A. v. Commissioner of Correction*, 148 Conn. App. 825, 832, 87 A.3d 600, cert. denied, 312 Conn. 901, 91 A.3d 907 (2014).

In any case, the transcript reveals that Schoenhorn inquired extensively of Officer DePietro about the difficulties that DePietro experienced, or could have experienced, in carrying the petitioner from the lobby of the police station to the booking area. (11/16/18 Tr., pp. 36-42, 45, 57, 82).[4] Schoenhorn also cross-examined Varone on the subject and elicited testimony that the petitioner was "quite heavy" and "dead weight." (11/15/18 Tr., p. 72.) All of this evidence supported an argument that the petitioner did not actively cause DePietro's injuries - which were neck and back pain – but rather that DePietro sustained these injuries merely from carrying the petitioner to the lobby. *State v. Haughwout,* supra, 339 Conn. 767-68. Thus, Schoenhorn did in fact supply an evidentiary basis for the argument that the petitioner did not proximately cause DePietro's injuries. Cf. id., 773 n.19.

The petitioner has no basis to complain that there might have been additional evidence that Schoenhorn could have elicited because the petitioner never supplied any such evidence at the habeas hearing. The petitioner failed to call Schoenhorn, DePietro,

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[4]For example, Schoenhorn asked DePietro: "He had to be carried the entire way, right?" (11/16/18 Tr., p. 45.)

or anyone else as witnesses. The petitioner testified briefly on his own but did not supply any additional evidence of what happened at the police station. Under these circumstances, the petitioner cannot prove prejudice stemming any ineffective assistance of counsel. See *Norton v. Commissioner of Correction*, 132 Conn. App. 850, 859, 33 A.3d 819 (petitioner cannot prevail on claim that trial counsel was ineffective for failing to investigate witnesses when "the petitioner has not presented us with any beneficial testimony from these witnesses that would demonstrate how they would have assisted in his case had trial counsel interviewed them" and thus "failed to establish that further investigation of these witnesses would have been helpful to his defense"), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012); *Lambert v. Commissioner of Correction*, 100 Conn. App. 325, 328, 918 A.2d 281 ("we are unable to conclude that the petitioner was prejudiced by the absence of independent gunshot residue testing without the submission of any such evidence that would undermine the certainty of the petitioner's conviction."), cert. denied, 282 Conn. 915, 924 A.2d 138 (2007).

Schoenhorn also rendered effective assistance in proposing a jury instruction on proximate cause. That instruction provided: "'It is necessary ... that the defendant's conduct is the cause without which the injury would not have occurred and the predominating cause or the substantial factor from which the injury follows as a natural direct and immediate consequence. In other words, the state must prove that [the defendant's deliberate conduct] ... was the proximate cause of the [injury claimed].'" *State v. Haughwout,* supra, 339 Conn. 772 n.17. The petitioner does not suggest any

alternative instruction that would have more adequately expressed his theory of defense. In any event, the trial court refused to give Schoenhorn's proposed instruction and the Supreme Court affirmed the court's decision. Id., 771-74. Thus, it is clear that any alternative instruction that further added to the state's burden of proof would not have passed muster. Accordingly, the petitioner cannot prove prejudice on the jury instruction issue.

The petitioner's claim of ineffective assistance of appellate counsel against Bourn also focuses on the jury instruction. The petitioner harps on the Supreme Court's statement that "the briefing on the question is not entirely clear ...." n Id., 772.[5] The

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[5]The entire passage from the opinion reads as follows: "Although the briefing on the question is not entirely clear, the defendant appears to contend that the jury could have possibly been misled in at least two distinct ways. First, the defendant argues that the trial court's instructions 'virtually eliminated' the element of causation and that, as a result, the jury was given a false impression that DePietro's injuries need not have actually been connected to the defendant's conduct in any way. (Internal quotation marks omitted.) In support of this argument, the defendant has hypothesized that DePietro's injuries could have been caused by 'shoveling snow' or 'sleeping wrong.' (Internal quotation marks omitted.) This argument is completely without merit. The court's charge, set forth previously in this opinion, clearly required the state to prove beyond a reasonable doubt that 'the defendant ... caused physical injury to [DePietro].'

"Reduced to its essence, the defendant's principal argument on the point appears instead to be that, in the absence of the requested instruction on proximate causation, the jury was effectively relieved of the need to consider whether DePietro's injuries were a sufficiently direct result of an action undertaken with the requisite specific intent. We reject this argument as well. The trial court expressly instructed the jury that the specific intent required by the statute—namely, an intent to prevent DePietro from performing his duties—must have been effectuated 'by means of causing physical injury to [DePietro].' In light of this instruction, we perceive no reasonable possibility that the jury could have been misled to believe that an injury caused without the required intent would suffice. For the foregoing reasons, we conclude that the trial court's instructions, viewed as a whole, fairly presented the issues raised at trial and that, therefore, there is no reasonable possibility that the jury was misled. As a result, the defendant's claim of instructional error with respect to this charge must fail. (Footnotes omitted.) Id., 772-74.

petitioner, however, did not call Bourn as a witness or even make Bourn's brief an exhibit. Thus the court has no idea of what Bourn said in the brief (or, for that matter, whether she even wrote the brief). Nor did the petitioner call an appellate expert or otherwise explain what Bourn could have said that would have made the issue clearer. Thus, the petitioner has not proven any deficient performance by appellate counsel.[6]

The petitioner has also not proven prejudice, which on a claim of ineffective assistance of appellate counsel means proof that there is "a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial...." (Internal quotation marks omitted.) *Valentine v. Commissioner of Correction*, 219 Conn. App. 276, 288–90, 295 A.3d 973, cert. denied, 348 Conn. 913, 303 A.3d 602 (2023). The Supreme Court's opinion on the subject, reprinted in note 5 below, breaks Bourn's argument down into two possible theories and rejects them both. Hence, the Court gave Bourn the benefit of the doubt as to the claim that she was raising and still found that the trial court's instructions on causation and intent were proper. The petitioner produced no expert testimony or made any other showing that a different or more clearly-written argument would have led to a different result. Thus, the petitioner has failed to prove

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[6]The court again notes that Bourn achieved significant success by convincing the court to vacate the convictions from the July 19 incident and reverse the conviction on one of the two assault on a police officer counts stemming from the July 22 incident.

prejudice and ineffective assistance of appellate counsel.

III. Conclusion

The court denies the petition for a writ of habeas corpus. Judgment shall enter for the respondent.

It is so ordered.

By the Court
(Schuman, J.) 6/4/2024
Carl J. Schuman
Judge Trial Referee, Superior Court

Kathryn Stackpole
First Asst. Clerk

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6/4/2024