DOCKET NO. CV20-5000622-S : SUPERIOR COURT

BARRY A. : JUDICIAL DISTRICT OF TOLLAND

V. :

COMMISSIONER OF CORRECTION : JUNE 4, 2024

STATE OF CONNECTICUT SUPERIOR COURT G.A. 19

2024 JUN -4 A 10: 42

MEMORANDUM OF DECISION

Barry A., the petitioner, alleges in his petition for a writ of habeas corpus that his sixth amendment right to effective assistance of trial and prior habeas counsel was violated and, as a result, his conviction should be vacated. Barry A. has not proven his claims and therefore the petition must be denied.

1. BACKGROUND

A jury convicted Barry A. of various counts of sexual assault and risk of injury. The court, *Nazzaro, J.*, sentenced him to forty years' incarceration, suspended after twenty years, followed by twenty years' probation. He was represented at trial by Attorney Sebastian DeSantis. Barry A. appealed, claiming that "(1) the court improperly prohibited defense counsel from refreshing the recollection of a witness, thus infringing on the defendant's right to confrontation under the federal constitution, (2) the court improperly allowed the state to present evidence of uncharged misconduct, and (3) the prosecutor engaged in prosecutorial impropriety, depriving him of a fair trial." State v. Barry A., 145 Conn. App. 582, 584, 76 A.3d 211, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013). Our Appellate Court affirmed. He then filed a petition for a writ of habeas corpus, represented by Attorney Michael Brown. In that petition, he claimed that "Attorney DeSantis failed to consult and retain a suitable child sexual assault victim expert early enough to benefit the petitioner fully; [h]e drafted and presented a motion for court-ordered expert witness fees inadequately; [w]hen that motion was denied, he failed to request a continuance of the criminal trial so that the petitioner might otherwise secure funds to obtain such expertise; and [h]e insufficiently challenged the victim's testimony." Barry A. v. Warden, Superior Court, judicial district of Tolland, Docket No. CV14-4006029-S (*Sferrazza, J.*, Apr. 27, 2018). The petition was denied and that denial was affirmed on appeal. Barry A. v. Commissioner of Correction, 190 Conn. App. 903, 207 A.3d 1123, cert. denied, 333 Conn. 905, 215 A.3d 159 (2019).

He then filed this petition. In this petition he claims that, through a claim of ineffectiveness of prior habeas counsel, trial counsel was ineffective for failing to (1) investigate and call Tiffany Hexter, Heather Fountaine, Bonnie Lathrop, Don Light and Tiffany Light; (2) properly cross-examine the victim; (3) investigate a pretrial offer and adequately communicate updates and other important information and (4) properly represent him at sentencing.

The habeas trial occurred on May 28, 2024. The court heard from Attorneys DeSantis and Brown and Barry A. testified. The parties submitted exhibits.

II. FACTS

Our Appellate Court identified the following facts presented to the jury:

> The defendant and his wife lived together with their four children in Plainfield until the defendant's arrest in 2007. They had three biological children, a daughter, C, and two sons, B and R. The defendant and his wife later adopted the victim in February, 1999.
>
> When the victim was approximately eleven years old, the defendant began sexually assaulting her. The first instance occurred when the defendant, a truck driver by profession, took her on an overnight truck run. The defendant removed the victim's clothes, and touched her chest and her "private." On multiple other occasions, the defendant sexually assaulted the victim by forcing her to engage in oral and vaginal intercourse in his truck, as well as at their home. After the assaults, the defendant would tell the victim that he was sorry and that he loved her. When the victim was thirteen years old, she told C about the sexual assaults, and C told their youth pastor. Shortly thereafter, the youth pastor reported the incident to the Department of Children and Families (department).

State v. Barry A., supra, 145 Conn. App. 584–85. The court heard the following testimony at the habeas trial.

1. Barry A.

Barry A. hired Attorney DeSantis to represent him. During the pretrial stage, he was at liberty. According to Barry A., there was no offer made by the state and he did not discuss any offers with Attorney DeSantis. Barry A. was not looking to plead in this matter. He recalled that Attorney DeSantis had hired Don Light and Light's daughter to investigate the case. Barry A. met with Light three times. He repeatedly asked Attorney DeSantis to reach out to witnesses. He wanted Attorney DeSantis to investigate Hexter. Barry A. worked for Hexter's parents in their home and oftentimes she would spend time alone with him. He also wanted them to investigate Fountaine because Fountaine lived with Barry A. at the time this occurred. He testified that Fountaine was contacted but did not provide any useful information. Similarly, he alerted Attorney DeSantis to Lathrop. According to him, there were a lot of young girls in the organization he worked with, sleeping in tents, and he wanted Attorney DeSantis to contact them because he believed it was important for people to hear what they had to say. They were contacted but declined to provide useful information. According to him, no witnesses were contacted to speak on his behalf at sentencing.

Barry A. wanted Attorney Brown to research the forensic examination of the victim and to raise a sixth amendment claim. Attorney Brown was assisted by an investigator, Eric Eichler. He also raised the issue of Attorney DeSantis' failure to properly cross-examine the victim.

Barry A. denied committing the charged offenses.

2. Attorney Sebastian DeSantis

Attorney DeSantis testified that he could not recall whether an offer was extended but Barry A. was not going to accept anything. The defense theory was that Barry A. did not commit the offenses and the victim was fabricating the allegations. Attorney DeSantis wanted to find a reason for fabrication that the jury could "grab onto." He recalled a dispute in the family, including an imminent divorce, arguments and dysfunction in the family and this led to coaxed or sua sponte allegations by the victim to help her mother. Attorney DeSantis' approach to cross-examining the victim was to focus on her credibility and inconsistencies in her statements. He wanted to avoid examining her on the lack of specific details because he was concerned about the state getting into the effect of trauma on memory.

Attorney DeSantis attempted to contact any identified witnesses and spoke to witnesses who were receptive. They also attempted to speak to Barry A.'s ex-wife. However, that side of the family was not cooperative with the defense. They did end up speaking to individuals who were friendly with Barry A. and supportive of him, including members of the church he was involved with. He retained experts on child sexual assault allegations. They were both helpful to the extent that they assisted Attorney DeSantis in going through the evidence and report whether to pursue to certain avenues, including calling them to testify as witnesses. They reported that they could not add anything to the defense and therefore there was no reason to have them prepare a report. Attorney DeSantis kept Barry A. apprised of the progress and findings of the investigation.

Attorney DeSantis did not call Hexter at trial because she would have been a character witness. He could not specifically recall why he did not call her as a witness, but recalled her as a good witness for the defense who had good things to say about Barry A. He recalled Fountaine as a potentially helpful witness, however her mother was being extremely protective of her and she was hesitant to involved. She lived out of state and it appeared that the only way she would appear was if she were subpoenaed.

Barry A. retained new counsel for appeal between verdict and sentencing, however, Attorney DeSantis continued to represent him at sentencing. Their relationship, however, had changed and Barry A. was unhappy with Attorney DeSantis. In preparation for sentencing, Attorney DeSantis was aware of the presentence investigation (PSI). His usual practice is to obtain character letters, work history and make mitigating arguments to limit the sentence imposed.

3. Attorney Michael Brown

Attorney Brown testified that he had considered and raised issues relating to expert testimony and preparation of the defense. There were issues relating to who Attorney DeSantis consulted with before trial and funding issues as well. Attorney Brown hired investigator Eichler to work on this case. He recalled asking Eichler to look into information that Barry A. had provided to him but did not recall any specifics. Given that the allegations covered an extended period of time, Attorney Brown was hoping to find a witness or evidence that would counter the allegations in a comprehensive fashion, rather than challenge the allegation at one specific point in time.

In determining what claims to raise he focused on claims that would have had an impact on the outcome of the trial, rather than making allegations of deficient performance that had no bearing on the trial. He did not focus on claims at sentencing.

III. LEGAL ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

It is well established that a criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. Horn v. Commissioner of Correction, 321 Conn. 767, 775, 138 A.3d 908 (2016). Thus, because "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair;" (internal quotation marks omitted). Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra, 686.

1. Two-part test

To determine whether a petitioner is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation at trial, courts apply the familiar two-part test adopted by the United States Supreme Court in Strickland. Skakel v. Commissioner of Correction, 329 Conn. 1, 30, 188 A.3d 1 (2018). A petitioner's claim that trial counsel's assistance was so defective as to require reversal of a conviction has two components. "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 sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Internal quotation marks and citations omitted.) Skakel v. Commissioner of Correction, supra, 30. Without a showing as to both components, it cannot be said that the conviction resulted from a breakdown in the adversary process, rendering the result unreliable. Strickland v. Washington, supra, 466 U.S. 687. However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Strickland v. Washington, supra, 697; State v. Brown, 279 Conn. 493, 525-26, 903 A.2d 169 (2006); Aillon v. Meachum, 211 Conn. 352, 362, 559 A.2d 206 (1989).

2. Performance Prong

The sixth amendment "does not guarantee perfect representation, only a reasonably competent attorney.... Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 30-31. With respect to the first part of the Strickland test, "the proper standard for attorney performance is that of reasonably effective assistance." Strickland v. Washington, supra, 466 U.S. 687. "Consequently, to establish deficient performance, the petitioner must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." Skakel v. Commissioner of Correction, supra, 31. "Moreover, strategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court." Id.

3. Deficient performance in regards to mitigation at sentencing

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland v. Washington, supra, 466 U.S. 690-91. Thus, "counsel must first evaluate what 'conceivable line[s] of mitigating evidence' exist and then decide whether following any of those lines would likely lead to evidence that 'would ... assist the defendant at sentencing.'" Lampkin v. State, 470 S.W.3d 876, 911 (Tex. App. 2015), citing Wiggins v. Smith, 539 U.S. 510, 123 S. Ct.

2527, 156 L.Ed.2d 471 (2003). In Wiggins v. Smith, "the United States Supreme Court held that although defense counsel was aware of certain aspects of the defendant's background, counsel's failure to compile a complete social history of the defendant was objectively unreasonable and, thus, counsel rendered deficient performance by failing to make a fully informed decision when deciding against presenting such mitigation evidence." Breton v. Commissioner of Correction, 325 Conn. 640, 669, 159 A.3d 1112 (2017). In deciding whether counsel's actions in failing to investigate further mitigation were reasonable, courts "must take into account all of the information available to counsel that has informed his or her judgment…." Doan v. Commissioner of Correction, 193 Conn. App. 263, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019).

The ABA Standards for Criminal Justice: Defense Function, (4th ed. 2017), also highlight the importance of investigating mitigation information. Standard 4-8.3 (d) directs defense counsel to "gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible," and 4-8.3 (e) directs that, where "a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary… In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary."

4. Prejudice

When defense counsel's performance is found to not be reasonable, a new trial is required only if there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, 466 U.S. 694. "The question, therefore, is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 38.

"The reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." United States v. Dominguez Benitez, 542 U.S. 74, 83, n.9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). It is a lesser standard than preponderance of the evidence. See Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); Chinn v. Shoop, 598 U.S. --, 2022 WL 16726032 (*Jackson, J.*, dissenting from denial of certiorari, November 7, 2022) (noting that the Court has "repeatedly said" that reasonable probability is "a qualitatively lesser standard"). Thus, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case . . . because the result of a criminal proceeding can be rendered unreliable, and thus the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 38. Instead, a petitioner must establish that the deficient performance gives rise to a loss of confidence in the verdict. Id.

5. Prejudice at sentencing

"Sentencing by its nature is a discretionary decision that requires the trial court to weigh various factors and to strike a fair accommodation between a defendant's need for rehabilitation or corrective treatment, and society's interest in safety and deterrence." (Internal quotation marks omitted.) State v. Wade, 297 Conn. 262, 284, 998 A.2d 1114 (2010). In determining whether prejudice results from deficient performance at sentencing by way of failing to uncover and present mitigating evidence, the United States Supreme Court, at least in the capital felony context, has required courts to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding [and reweigh] it against the evidence in aggravation." Williams v. Taylor, 529 U.S. 362, 397–98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The Court has reaffirmed "the principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), abrogated by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); State v. Peeler, 271 Conn. 338, 449, 857 A.2d 808 (2004). In making an individualized assessment of the punishment to be imposed, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (Citation omitted.) Penry v. Lynaugh, supra, 319. The sentencer must be told if a defendant has the "kind of troubled history [the Court has] declared relevant to assessing a defendant's moral culpability." Wiggins v. Smith, supra, 539 U.S. 535. Of course, a defendant's explicit instructions that mitigation not be pursued, interference with counsel's efforts to investigate mitigation or failure to cooperate with investigative efforts are factors to be considered in determining prejudice. Breton v. Commissioner of Correction, supra, 325 Conn. 670, citing Cummings v. Secretary for the Dept. of Corrections, 588 F.3d 1331, 1358–59 (11th Cir. 2009), cert. denied sub. nom. Cummings–El v. McNeil, 562 U.S. 872, 131 S. Ct. 173, 178 L. Ed. 2d 103 (2010). In Breton, our Supreme Court held that, in order to prove prejudice under Strickland, the petitioner must make two showings if, as a threshold matter, it is established that the petitioner made a knowing and intelligent decision not to present mitigating evidence. First, "the petitioner must show that if he had been advised more fully about the mitigating evidence, there is a reasonable probability he would have permitted trial counsel to present such evidence at trial." (Citations omitted.) Id., 680. "Second, the petitioner must establish that, if such evidence had been presented, a reasonable probability exists that the result would have been different." (Citation omitted.) Id., 681. Breton involved the death penalty.

However, the jurisprudence for determining prejudice stemming from a failure to present mitigating evidence at sentencing in a non-capital case is not well developed. See C. B. Hessick, "Ineffective Assistance at Sentencing," 50 B.C. L. Rev. 1069 (2009).

Thus, in a previous case, this court adopted various factors to be considered in determining whether a petitioner has proven prejudice stemming from counsel's failure to present mitigation at sentencing. See Joshua Cruz v. Commissioner of Correction, Superior Court, judicial district of Tolland, Docket No. CV 16-4007793-S (January 6, 2020, *Bhatt, J.*), aff'd, 206 Conn. App. 17, 257 A.3d 399, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021).

Given Connecticut's statutory sentencing scheme, this court has identified the following non-exclusive list of factors it will consider when determining prejudice stemming from counsel's failure to investigate and present mitigation evidence at sentencing:

1. The range of sentence the petitioner was exposed to and whether the maximum sentence pursuant to that range was lesser than the maximum allowable by law;
2. How far below the maximum sentence the petitioner could have received was the sentence actually imposed;
3. The sentencing court's reasoning for imposing the sentence it did;
4. The strength of the state's case and the viability of any defenses;
5. Whether mitigation evidence was presented;
6. The nature of the mitigating evidence – in other words, whether the evidence serves to explain the petitioner's actions or to demonstrate the petitioner's diminished moral culpability for reasons including, but not limited to, his background;
7. Counsel's reasons for failing to present the mitigating evidence at issue;
8. Whether the mitigating evidence not presented is cumulative of other mitigation presented at the time of sentencing;

9. The petitioner's criminal history.

An analysis of these factors will permit the court to determine whether the missing information undermines the court's confidence in the sentence actually imposed.

In essence, in order for a petitioner to demonstrate prejudice stemming from a failure to investigate and present mitigation evidence, the evidence must contain information that was not presented to the sentencing court through either the PSI or the comments of counsel or others speaking at the sentencing. It must be of a nature that courts routinely consider at the time of sentencing: evidence exploring and highlighting the defendant's background, his moral and legal culpability, positive aspects of his character and other facts that show his ability to be rehabilitated and likelihood of rehabilitation and becoming a productive member of society. If the area the missing evidence touches upon is duplicative of information already provided to the sentencing court, then in order for it to have an impact on the prejudice analysis, it must be so significant that it demonstrates that the evidence already provided was so insufficient as to render its impact meaningless.

6. Ineffective Assistance of Prior Habeas Counsel

The use of a habeas petition to raise an ineffective assistance of habeas counsel claim was approved by our Supreme Court in Lozada v. Warden, 223 Conn. 834, 613 A.2d 818 (1992). In Lozada, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. In Lozada, the court explained that to succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." (Cleaned up.) Harris v. Commissioner of Correction, 191 Conn. App. 238, 246, 214 A.3d 422, cert. denied, 333 Conn. 919, 217 A.3d 1 (2019).

The Strickland test applies to each attorney alleged to have been ineffective. "In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy Strickland twice." (Cleaned up.) Harris v. Commissioner of Correction, supra, 191 Conn. App. 247. "With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial. Simply put, a petitioner cannot succeed as a matter of law on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." (Cleaned up.) Id. 248.

B. DISCUSSION

Barry A. alleges that Attorney Brown was ineffective for failing to raise the following claims against Attorney DeSantis: failing to (1) investigate and call Tiffany Hexter, Heather Fountaine, Bonnie Lathrop, Don Light and Tiffany Light; (2) properly cross-examine the victim; (3) investigate a pretrial offer and adequately communicate updates and other important information and (4) properly represent him at sentencing. All of these claims must be denied.

First, the failure to investigate claims are lacking any proof. Hexter, Fountaine, Lathrop and both Lights did not testify at the habeas trial. Without that testimony, this court cannot assess how they would have responded to the questions Attorney DeSantis allegedly should have asked.

Similarly, the claim pertaining to the cross-examination of the victim is also denied since the victim did not testify at the habeas trial. The court notes that this very claim was also raised in the first habeas trial and Attorney DeSantis' performance was ruled to be reasonably competent.

Third, there is no evidence of any pretrial offer. Attorney DeSantis recalled that there may have been an offer, but no witness testified with any certainty as to the existence of any offer, nor of the details of any such offer. Barry A. also testified that he was not interested in pleading guilty. Attorney DeSantis testified credibly that he fully communicated with Barry A. Therefore, this claim is also denied.

Finally, any claim as to sentencing is denied. Attorney DeSantis' performance was not deficient. He submitted approximately twenty letters in support of Barry A. at sentencing and argued effectively. Barry A. received a sentence of twenty years' incarceration, less than the maximum possible sentence and ten years less than the state asked for. Judge Nazzaro noted that he had considered all the mitigation presented to him, including the letters, commendations and certificates, in fashioning the sentence. Furthermore, Barry A. has presented no mitigation evidence to this court that could have been presented to the trial court but was not. Thus, Barry A. has not proven deficient performance or prejudice.

IV. CONCLUSION

Barry A. has not presented any evidence in support of his claims. There is no deficient performance and no prejudice, therefore, the petition is denied.

Bhatt, J.

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