

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Todd Covington, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 3, 2022

Court of Appeals Case No.
22A-PC-38

Appeal from the
Vanderburgh Circuit Court

The Honorable
Kelli Fink, Magistrate

Trial Court Cause No.
82C01-1808-PC-4418

Vaidik, Judge.

Case Summary

- [1] Todd Covington, Jr., appeals the denial of his petition for post-conviction relief, arguing the post-conviction court erred in finding he did not receive ineffective assistance of trial counsel. We affirm.

Facts and Procedural History

- [2] The following facts are taken largely from this Court's opinion on direct appeal, *Covington v. State*, No. 82A01-1407-CR-292, 2015 WL 1396126 (Ind. Ct. App. Mar. 25, 2015), *trans. denied*.
- [3] On the night of March 7, 2014, Demetrius Fingers, a barber, was at his shop waiting for a client, Laniko Payne. Around 8 p.m., Fingers saw Payne outside the shop in a black Expedition. Payne told Fingers to get in the back seat. When Fingers did so, he saw two other men. One, who was never identified, sat in the back seat next to Fingers, while the other, later identified as Covington, sat in the front passenger seat.
- [4] Once Fingers got in the back seat, the unidentified man and Covington pointed guns at him, and Covington reached into Fingers's pocket and removed \$300 or \$400 in cash. Payne demanded Fingers give them drugs, but Fingers did not have any. The men then drove to a house where they believed they could get drugs. The unidentified man and Covington escorted Fingers at gunpoint to the house and had him knock, but no one answered the door. Fingers then

attempted to run, and he was shot multiple times from behind. Covington and the unidentified man then got back into Payne's SUV and left.

[5] Police were called and found Fingers suffering from gunshot wounds. Believing Fingers was close to death, one of the responding officers recorded Fingers using his body camera and asked him what happened, but Fingers did not identify his attackers. Fingers was taken to the hospital, where he was treated for seven gunshot wounds, several of which were life-threatening. The day after the shooting, Detective Michael Sides of the Evansville Police Department received an anonymous tip that Payne was involved in the shooting and showed Fingers a photo array that included Payne. Although still in the hospital and extremely weak, Fingers was able to identify Payne. A few days later, Detective Sides again received an anonymous tip, this time implicating Covington. He presented Fingers a photo array that included Covington. The photo of Covington was a jail booking photo taken in February on an unrelated matter. Fingers did not identify anyone in the second photo array.

[6] On March 11, while watching television in his hospital room, Fingers saw a news story about Covington being arrested the night before for an unrelated crime. The footage included a photo of Covington. Fingers informed his mother, who was in the room with him, that the man on the news was one of his attackers. His mother called Detective Sides, who brought another photo array that included Covington. This photo was the booking photo taken after

Covington's arrest on March 10.¹ Fingers identified Covington as one of his attackers.

[7] The State charged Covington with Class A felony attempted murder, Class A felony robbery resulting in serious bodily injury, and Class B felony criminal confinement. The State also alleged Covington was a habitual offender. Covington moved for a speedy trial, which occurred in May. At trial, Covington's defense counsel targeted Fingers's identification of Covington, particularly that Fingers did not pick Covington out of the first photo array and only identified him after having already seen his photo in both the first array and on the news. She also emphasized that Fingers had been unable to describe the attackers after the shooting and was on medication for serious injuries when he did identify Covington days later. During Fingers's testimony, defense counsel introduced the March 10 booking photo of Covington that accompanied the news station's written article about his arrest.² However, Fingers was unable to say if this was the same photo he saw on the news, so the trial court would not admit the photo into evidence.

¹ It is unclear from the record whether this photo—the March 10 booking photo—was the one used in the news footage. At the post-conviction hearing, Covington testified that “the same photo that was on the news [was] in the [second] photo array.” Tr. p. 21. The news footage is not in the record. Nor did Fingers testify that the two photos he saw were the same. When trial counsel presented the March 10 booking photo to Fingers and specifically asked if that was the photo shown in the footage, Fingers stated he could not remember.

² Technically, this photo was already in evidence, as it was the same photo used in the second photo array, which was admitted earlier in Fingers's testimony.

[8] The jury found Covington guilty as charged. Covington waived his right to trial by jury on the habitual-offender enhancement, and the trial court determined he was a habitual offender. The court sentenced Covington to seventy-five years. Later that year, Covington filed his direct appeal, challenging the admission of the body-camera footage, the second photo array, and testimony relating to the anonymous tips received by Detective Sides. We affirmed.

[9] In 2018, Covington filed a petition for post-conviction relief, asserting his trial counsel was ineffective for failing to investigate and obtain the news footage from which Fingers initially identified Covington. At her deposition, trial counsel testified her strategy on defense was to “taint Mr. Fingers’s identification of Mr. Covington.” Appellee’s App. Vol. II p. 15. She stated she attempted to obtain the news footage but was unable to do so and never watched it herself. She also stated she did not want to admit the footage at trial anyway, as she knew “the contents of that video reference[d] the fact that Mr. Covington was arrested with . . . cocaine and a gun while fleeing the police.” *Id.* at 21. In place of the footage, she stated

I had a copy of Mr. Covington’s most recent booking photo. Mr. Fingers had indicated that the photo that he had seen on the news was a booking photo. I believed that I had found the photo that Mr. Fingers had seen I attempted to get Mr. Fingers to identify that as the photograph he had seen on the news. When I attempted to make my offer to prove, he was either unwilling or unable to indicate that that is the photograph he saw.

Id. at 34-35. A hearing was held on Covington’s motion for post-conviction relief in February and September 2019, and trial counsel’s deposition was admitted into evidence. Covington did not enter the news footage into evidence. Following the hearing, the post-conviction court issued findings and conclusions denying relief.

[10] Covington now appeals.

Discussion and Decision

[11] The petitioner in a post-conviction proceeding bears the burden of proving the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Covington is appealing a negative judgment; therefore, he must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Although we do not defer to the post-conviction court’s legal conclusions, a post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *State v. Damron*, 915 N.E.2d 189, 191 (Ind. Ct. App. 2009), *reh’g denied, trans. denied*.

[12] Covington contends the post-conviction court erred in finding his trial counsel was not ineffective. To prevail on a claim of ineffective assistance of counsel, Covington must show both that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him.

Coleman v. State, 694 N.E.2d 269, 272 (Ind. 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984)). There is a strong presumption that counsel rendered adequate assistance. *Id.* “Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance.” *Id.* at 273. “Counsel’s performance is evaluated as a whole.” *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable.” *Coleman*, 694 N.E.2d at 272.

[13] Covington argues his trial counsel was ineffective in failing to investigate and present certain evidence. While effective representation requires adequate pretrial investigation and preparation, we do not judge an attorney’s performance with the benefit of hindsight. *McKnight v. State*, 1 N.E.3d 193, 200-01 (Ind. Ct. App. 2013). “With the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further.” *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007). When deciding a claim of ineffective assistance for failure to investigate, we apply a great deal of deference to counsel’s judgments. *Id.* at 201. Indeed,

[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 limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91. In addition, establishing failure to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what an investigation, if undertaken, would have produced. *McKnight*, 1 N.E.3d at 201 (citing *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *reh'g denied*). ““This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result.”” *Id.* (quoting *Woods*, 701 N.E.2d at 1214).

[14] Covington alleges trial counsel was deficient in failing to “obtain the photograph of [Covington] that was broadcast on the news . . . to present in his defense at trial.” Appellant’s Br. p. 16. Our review of the record indicates trial counsel made a reasonable strategic decision not to present the news footage. Trial counsel testified she knew the news footage contained information prejudicial to Covington, including that he had run from police while in possession of cocaine and a handgun. Thus, she determined it would not be helpful to present the footage to the jury. Furthermore, trial counsel’s strategy was to undermine Fingers’s identification of Covington. Trial counsel did this in many ways—noting Fingers did not initially identify Covington to police or

in the photo array, that he was on medications at the time of the identification, and that his identification came only after seeing Covington's photo on the news. Additionally, trial counsel believed she could present the photo that accompanied the written article about Covington's March 10 arrest, which would have shown the jury what Fingers saw without the additional damaging information provided by the footage. While this attempt was unsuccessful, we cannot say it was an unreasonable strategy.

[15] Nevertheless, Covington argues that trial counsel could not have made a strategic choice because she failed to conduct a sufficient investigation into the evidence—namely watching the footage herself—to support that choice. We disagree. As noted above, trial counsel knew what the news footage contained and that it would be damaging to Covington. And she believed she had other ways to undermine Fingers's identification. Furthermore, Covington insisted on a speedy trial, despite trial counsel's specific warning that this would limit her ability to obtain evidence including the news footage. Given these circumstances, we cannot say trial counsel's decision to forego investigating the news footage in favor of investigating other pieces of evidence was unreasonable.

[16] And even if trial counsel's performance was deficient, we agree with the post-conviction court that Covington failed to show prejudice. He does not tell us how trial counsel's review or presentation of the footage would have affected the proceeding aside from general assertions that it would have "undermined the credibility of the purported victim." *Id.* at 8. But Covington failed to

introduce the news footage at the hearing, and as such it is not available for our review. Therefore, it is impossible for us to determine that, had trial counsel presented or even reviewed this footage, the outcome of the proceeding would have been different.

[17] The post-conviction court properly denied relief on this claim.

[18] Affirmed.

Crone, J., and Altice, J., concur.