

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Russell W. Brown, Jr.
Merrillville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

George P. Sherman
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Evan Hodge,
Appellant-Defendant,
v.
State of Indiana,
Appellee-Plaintiff

June 30, 2023
Court of Appeals Case No.
22A-PC-2033
Appeal from the Lake Superior
Court
The Honorable Samuel L. Cappas,
Judge
The Honorable Kathleen Sullivan,
Magistrate
Trial Court Cause No.
45G04-1811-PC-22

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

- [1] Evan Hodge appeals the denial of his petition for post-conviction relief. Hodge raises a single issue on appeal: did the post-conviction court (PCR Court) err in finding that he was not denied effective assistance of trial counsel?
- [2] We affirm.

Facts & Procedural History

- [3] On direct appeal, this court recounted the facts supporting Hodge’s conviction:

[O]n December 18, 2014, Karen Cannon and her fiancé, Martin Joshua, III, spent the night together. The following morning, December 19, 2014, Cannon and Joshua went their separate ways but kept in contact by phone. Joshua was driving a silver Jaguar and had five or six thousand dollars in his possession. Cannon spoke with Joshua by phone around 4:00 p.m. and asked who was with him. Joshua replied, “Tay-Tay and Keyron.” “Tay-Tay” was Hodge’s nickname.

Cannon next spoke to Joshua around 8:00 or 9:00 p.m., and Joshua said he was still with “Tay-Tay and Keyron.” After Cannon was unable to reach Joshua later that evening, she drove to the home of Joe and Ruthie Foster located in Gary, Indiana, because she knew that Joshua often spent time at the residence. Ruthie is Keyron’s grandmother. When Cannon arrived, she saw an ambulance and a police officer.

The Fosters were at their home on the evening of December 19, 2014, when they heard a gunshot. A few minutes later, there was a knock at the front door. Joe opened the door, and Joshua fell inside the house. Joshua’s intestines were protruding from his abdomen. Joshua tried to stand up but was unable to do so. Joshua was “dazed” and “kept on moaning.” Joshua said, “Tay-Tay killed me.” Joe and Ruthie recognized “Tay-Tay” as a nickname for Hodge. A call was placed to 911.

Corporal Donte Manuel and Corporal Jemel Martin with the Gary Police Department responded to the 911 call. The officers saw a silver Jaguar automobile parked outside the Fosters' house. The vehicle was running and its headlights were on, but the doors were locked and no one was inside the vehicle. When the officers entered the Fosters' home, they saw Joshua lying on the kitchen floor, "rolling around from side to side ... [, appearing] to be in excruciating pain, [and] grabbing his lower abdomen." Joshua had sustained multiple gunshot wounds, including a graze wound on the left side of his chest, a wound to the left of his navel, where his intestines protruded, and a wound to his back, just above the hip. Corporal Manuel asked Joshua several times who shot him and Joshua replied each time, "Evan Hodge."

When Gary Fire Department emergency medical technician (EMT) arrived at the Fosters' house, he observed that Joshua was "semi-conscious." The EMT and his partner began life-saving measures and then transported Joshua to Northlake Methodist Hospital. When Joshua arrived in the emergency room, he did not have blood pressure or a pulse. Medical staff attempted to resuscitate Joshua for about an hour before he was pronounced dead. An autopsy was performed, and the coroner determined the cause of death was the gunshot wound to the abdomen.

When Corporal Manuel and Corporal Martin investigated the scene of the crime, they found a cell phone and one thousand dollars in loose currency on the Fosters' front porch and two shell casings near the Jaguar. Two plastic cigar tips and a cigarette butt also were found near the Jaguar. DNA testing of the cigar tips and cigarette butt revealed a profile that was consistent with that of Hodge. A sample taken from a "large glob of spit" found at the scene indicated an enzyme found in saliva and a DNA profile also consistent with that of Hodge.

On December 29, 2014, the State charged Hodge with murder. On November 19, 2015, the State amended the information by adding carrying a handgun without a license, as a Level 5 felony, and a habitual offender enhancement. At trial, and over Hodge's objections, the State introduced testimony related to statements made by Joshua that he was shot by Hodge. The trial court overruled the objections and admitted the statements as dying declarations. The trial court also admitted into evidence, over Hodge's objections, two police reports. At the conclusion of the trial, the jury found Hodge guilty as charged. He was sentenced to eighty-five years in the Indiana Department of Correction.

Hodge v. State, No. 45A03-1701-CR-111, 2017 WL 5895146, at *2 (Ind. Ct. App. Nov. 30, 2017) (citations to record omitted), *trans. denied*.

[4] On direct appeal, Hodge challenged (1) admission into evidence of Joshua’s statements as dying declarations; (2) admission into evidence of two police reports; and (3) whether the State met its burden of proving beyond a reasonable doubt that he knowingly or intentionally killed Joshua. *Hodge*, 2017 WL 5895146, at *4-5. This court affirmed the conviction on all three grounds. *Id.* at *5.

[5] Hodge filed a petition for post-conviction relief on November 28, 2018, which he subsequently amended. *Appendix* at 2, 7. As amended, he maintained, among other things not at issue here, that his trial counsel, Matthew LaTulip, provided ineffective assistance by failing to cross-examine a State witness about his identification of Hodge as “Tay-Tay”. *Id.* at 79. Following a hearing at which Attorney LaTulip testified, the PCR Court denied Hodge’s petition on July 27, 2022. This appeal ensued. Additional facts will be provided as necessary.

Discussion & Decision

[6] Petitions for post-conviction relief constitute civil proceedings wherein defendants may bring “limited collateral challenges to a conviction and sentence.” *State v. Hamilton*, 197 N.E.3d 356, 362 (Ind. Ct. App. 2022), *trans. denied*. Grounds for relief are limited in scope to issues unknown at trial or

unavailable on direct appeal. *Id.* (citation omitted). An issue available on direct appeal but not raised is waived, and an issue litigated adversely to the defendant is res judicata. *Id.* The petitioner has the burden of proving claims by a preponderance of the evidence. *Id.*

[7] When a petitioner appeals from the denial of post-conviction relief, they “stand in the position of one appealing from a negative judgment.” *Williams v. State*, 160 N.E.3d 563, 576 (Ind. Ct. App. 2020), *trans. denied*. Thus, to prevail on appeal, the petitioner “must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). In other words, reversal is warranted only when there is a definite and firm conviction that the PCR Court committed error. *Id.* Under this “clearly erroneous” standard, we cannot reweigh the evidence nor judge witness credibility, and we will only consider “probative evidence and reasonable inferences” supporting the PCR Court’s ruling. *Reeves v. State*, 173 N.E.3d 1134, 1140 (Ind. Ct. App. 2021), *trans. denied*.

[8] Allegations of ineffective assistance of counsel may serve as proper grounds for post-conviction relief. *McKnight v. State*, 1 N.E.3d 193, 199 (Ind. Ct. App. 2013) (citing *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). In *Strickland v. Washington*, the U.S. Supreme Court established the standard through which we analyze claims of ineffective assistance of counsel. 466 U.S. 668, 686 (1984)

(addressing the Sixth Amendment’s guarantee of the right to counsel, which implicates the right to effective assistance of counsel). A defendant alleging ineffective assistance of counsel must demonstrate (1) that counsel’s performance was deficient and (2) that counsel’s deficient performance prejudiced the defense. *Id.* at 687. If the petitioner fails to prove either one of these two prongs, their petition for relief fails. *Id.* Thus, claims of ineffective assistance of counsel may be resolved on a prejudice inquiry alone. *Hamilton*, 197 N.E.3d at 363. To satisfy a claim of deficient counsel, the petitioner must prove that the representation fell below an objective standard of reasonableness. *Ritchie*, 875 N.E.2d at 714. As for prejudice, the defendant must demonstrate that but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. *Id.*

[9] There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012). Further, there is “no constitutional requirement that a defense attorney be a flawless strategist or tactician.” *Woodson v. State*, 961 N.E.2d 1035, 1042 (Ind. Ct. App. 2012). The nature and extent of cross-examination is a hallmark of trial strategy and is not to be second-guessed on appeal. *Williams*, 160 N.E.3d at 579; *see also Bivins v. State*, 735 N.E.2d 1116, 1134 (Ind. 2000) (holding that counsel is permitted to exercise reasonable judgments in strategy).

[10] In the case at bar, Hodge argues that Attorney LaTulip prejudiced his defense by not cross-examining Joe Foster, a State witness, about his identification of Hodge as “Tay-Tay” when presented with a photo lineup during an interview with police before trial. According to Hodge, cross-examination would have revealed to the jury that Foster had initially equivocated in his selection of Hodge as the individual known as “Tay-Tay.” Hodge maintains that this was significant because Foster’s testimony was “the only undisputed evidence regarding who Joshua indicated shot him.” *Appellant’s Brief* at 14. Hodge’s bold assertion is not supported by the record before us.

[11] Foremost, the victim made dying declarations unequivocally identifying Hodge as the individual who shot him. In particular, the responding officers asked the victim multiple times who shot him, and each time he identified Hodge as the perpetrator. At the scene of the murder, police officers found cigar tips and a cigarette butt, both of which revealed a DNA profile consistent with that of Hodge. Other evidence included a sample of saliva recovered at the scene that revealed a profile consistent with that of Hodge. The victim’s girlfriend informed the police that he had been with “Tay-Tay” in the hours before his death. Considering this evidence, Hodge did not meet his burden of demonstrating that but for Attorney LaTulip’s supposed error, there is a reasonable probability that the outcome of the proceedings would have been different. Because this case may be decided on prejudice alone, we need not

rule on trial counsel's alleged deficient performance.¹ In sum, the evidence does not lead to an opposite conclusion to that reached by the PCR Court.

[12] Judgment affirmed.

Riley, J. and Pyle, J., concur.

¹ We note, however, that Attorney LaTulip provided a reasonable justification for his decision to not cross-examine the State witness about the pretrial identification of Hodge as "Tay-Tay".