

Case Summary

Stephen B. Reeves (“Reeves”) appeals the denial of his petition for post-conviction relief, wherein he challenged his conviction for Murder. We affirm.

Issues

Reeves presents two issues for review:

- I. Whether he was denied the effective assistance of trial counsel; and
- II. Whether he was denied the effective assistance of appellate counsel.

Facts and Procedural History

On direct appeal, the Court recited the relevant facts as follows:

The facts most favorable to the verdict show that on March 4, 2005, Reeves, Lyndi Lolmaugh (Reeves’s live-in girlfriend), and two friends played cards at Reeves’s home. Shuff arrived at Reeves’s home around 11:00 p.m., after being invited by Reeves. By sometime shortly after midnight, the two friends had left and Lolmaugh had gone upstairs to bed, leaving Reeves and Shuff talking at the kitchen table. Early on March 5, Reeves awoke Lolmaugh and told her that he had shot Shuff. When Lolmaugh and Reeves returned downstairs, Lolmaugh saw Shuff sitting in a chair with blood running down his face. Shuff was making a gurgling sound, and it was apparent that he was not yet dead. Reeves shot Shuff in the face three more times, once with a handgun, and twice with a rifle he retrieved from his bedroom. Reeves finally took a towel, wrapped it around Shuff’s neck, and twisted Shuff’s head until the gurgling sound ceased. Reeves then pulled Shuff off the chair, laid his body on the floor and emptied Shuff’s pockets.

At Reeves’s direction, Lolmaugh left the home to find Steve Peepers, a neighbor, to help dispose of Shuff’s body. Lolmaugh, Peepers, and Harold Curtis, who had been at Peepers’ residence, all returned to Reeves’s home, at which time Reeves told Curtis and Peepers that he had killed Shuff. Reeves and Peepers wrapped Shuff’s body in a plastic tarp, accidentally enclosing several items: a pair of plastic gloves, a pair of jeans, a shirt, a towel, a bankcard, a wallet, a phone card, and a stock. Reeves and Peepers then placed Shuff’s body in Shuff’s car, which was parked behind Reeves’s house. Peepers, at Reeves’s direction, left with the guns used to shoot Shuff and threw

them in a nearby river. Lolmaugh and Reeves then departed, with Lolmaugh driving Shuff's car and Reeves following in his own car. They left Shuff's car in an open field and returned home in Reeves's car.

After a short investigation, Reeves was arrested and charged with Shuff's murder. Later, Peepers showed the police where he had thrown the guns in the river, and the police recovered Reeves's rifle.

Reeves v. State, No. 20A03-0604-CR-187, slip op. at 2-3 (Ind. Ct. App. Sept. 6, 2006).

Upon his conviction for Murder, Reeves was sentenced to sixty-five years imprisonment. See id. at 4. His conviction was affirmed on direct appeal. See id. at 2.

On August 27, 2009, Reeves filed a petition for post-conviction relief. A hearing was conducted on December 17, 2009. On May 24, 2009, the post-conviction court issued its findings of fact, conclusions of law, and order denying Reeves post-conviction relief. This appeal ensued.

Discussion and Decision

Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment of the post-conviction court unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. 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. Id. In this review, findings of fact are accepted unless they are clearly erroneous and no deference is accorded to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I. Effectiveness of Trial Counsel

Reeves claims that his trial attorney was ineffective because he: (1) failed to adequately challenge a trash search conducted at Reeves's residence and (2) failed to object to an alleged mandatory instruction.

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Id. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." Id. "Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. Id. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. Further, we "strongly presume" that counsel provided adequate assistance and

exercised reasonable professional judgment in all significant decisions. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002).

On March 9, 2005, four days after Shuff's murder, Detective Michael Sigsbee of the Elkhart Police Department conducted a trash pull at Reeves's residence and recovered several blood-stained articles. According to Detective Sigsbee's trial testimony, the trash had been set out for pickup in an alley.

Subsequently, Reeves's trial attorney filed a motion to suppress the evidence obtained as a result of the trash search. Reeves claims that counsel's efforts were inadequate in that counsel relied upon a "plagiarized" motion to suppress supplied by one of Reeves's fellow inmates, which failed to cite relevant authority. Appellant's Brief at 13. Reeves now insists that a properly drafted motion to suppress would have cited Litchfield v. State, 824 N.E.2d 356 (Ind. 2005) for the proposition that a warrantless trash search must be predicated upon articulable individualized suspicion. Reeves also contends that, had counsel adequately consulted with Reeves and properly investigated the circumstances surrounding the trash pull, the lack of articulable individualized suspicion would have become evident. According to Reeves, counsel should have deposed the police officers involved and would have discovered that they were prompted by "hearsay within hearsay" tantamount to an "anonymous tip." Appellant's Brief at 9.

Litchfield was decided on March 23, 2005, eighteen days after Shuff's murder and fourteen days after the trash pull. An argument for retroactive application of Litchfield was considered by our Indiana Supreme Court in Membres v. State, 889 N.E.2d 265 (Ind. 2008).

Appellant Membres claimed that the search of his trash was unlawful under Litchfield, which had been decided two weeks after the search. See id. at 270. The Court observed: “The rule announced in Litchfield is designed to deter random intrusions into the privacy of all citizens. Retroactive application of that rule would not advance its purpose for the obvious reason that deterrence can operate only prospectively.” Id. at 274.

Accordingly, the Court announced: “Litchfield applies in Litchfield itself, and also any other cases in which substantially the same claim was raised before Litchfield was decided. But challenges to pre-Litchfield searches that did not raise Litchfield-like claims in the trial court before Litchfield was decided are governed by pre-Litchfield doctrine even if the cases were ‘not yet final’ at the time Litchfield was decided.” Id. See also Belvedere v. State, 889 N.E.2d 286, 288 (Ind. 2008) (holding “because Belvedere’s challenge to this pre-Litchfield search was first raised after Litchfield was decided, Litchfield is not available to him in this appeal.”)

Here, an exact date of trial counsel’s appointment is not reflected in the post-conviction record; thus, it is not clear that counsel was representing Reeves within the narrow window of opportunity to make a pre-Litchfield argument raising a Litchfield-like claim. Nonetheless, an attorney is not required to anticipate changes in the law in order to be considered effective. Smylie v. State, 823 N.E.2d 679, 690 (Ind. 2005), cert. denied, 546 U.S. 976 (2005). At the time that Reeves’s trash was pulled, a trash search was governed by the law as articulated in Moran v. State, 644 N.E.2d 536 (Ind. 1994) “which looked to the totality of the circumstances to evaluate the reasonableness of a search and seizure.”

Belvedere, 889 N.E.2d at 288.

Reeves claims that trial counsel failed to properly investigate those surrounding circumstances. However, he developed no post-conviction record in this regard. He presented no evidence to support his assertion that the trash search was merely predicated upon hearsay within hearsay. Bald assertions of counsel's omissions and mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

Reeves also claims that his trial counsel should have objected to the following instruction:

You are the exclusive judges of the evidence, the credibility of the witnesses, and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account their ability and opportunity to observe; their memory, manner, and conduct, while testifying; any interest, bias, or prejudice they may have; any relationship with other witnesses or interested parties; and the reasonableness of their testimony considered in the light of all the evidence in the case.

You should attempt to fit the evidence to the presumption that the defendant is innocent and to the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. However, if you find that the testimony of a witness is so unreasonable as to be unworthy of belief, or if you find so much conflict between the testimony of witnesses that you cannot believe all of them, then you must determine which of them you will believe and which of them you will disbelieve.

In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience, and common sense gained from day-to-day living. You may find that the number of witnesses who testify to a particular fact or on one side or the other or the quantity of evidence on a particular point, does not control your determination of the truth. You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

(Tr. 14-15.) Directing our attention to Gantt v. State, 825 N.E.2d 874 (Ind. Ct. App. 2005), Reeves argues that the foregoing instruction invaded the province of the jury by requiring them to adopt either Lolmaugh’s testimony or his own contradictory version of events.

In Gantt, the jury had been instructed that it “must believe one or the other” of the witnesses. 825 N.E.2d at 878. The Gantt Court observed, “[w]hen two witnesses give contradictory accounts, it is not true that the jury must believe one or the other. The jury may choose to believe neither witness, believe aspects of the testimony of each, or believe the testimony but also believe in a different interpretation of the facts than that espoused by the witnesses, among other possibilities.” Id. (emphasis in original.) Accordingly, the Court found that the instruction was an erroneous statement of the law and invaded the province of the jury to determine credibility and to accept or reject evidence as it sees fit. Id.

Here, in contrast, the challenged instruction does not mandate that the jury believe any witness. In the face of conflicting evidence, the jury was free to make its own decision. As such, it was not incumbent upon trial counsel to object that the instruction invaded the province of the jury. Reeves has failed to demonstrate that he was denied the effective assistance of trial counsel.

II. Effectiveness of Appellate Counsel

Reeves contends that he was denied the effective assistance of appellate counsel when counsel failed to raise a Litchfield claim. Ineffective assistance is very rarely found in cases involving appellate counsel’s failure to raise an issue upon appeal. Bieghler v. State, 690

N.E.2d 188, 193 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998). In light of Membres and Belvedere, Reeves would not have prevailed upon a Litchfield claim, as he was not entitled to its retroactive application. Therefore, he has not demonstrated ineffectiveness of appellate counsel.

Conclusion

Reeves did not establish that he was denied the effective assistance of trial or appellate counsel. Accordingly, the post-conviction court properly denied Reeves' petition for relief.

Affirmed.

NAJAM, J., and DARDEN, J., concur.