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**IN THE
COURT OF APPEALS OF INDIANA**

TERRY DAVIS,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 49A02-1006-PC-747

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G02-9903-PC-051678

March 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Terry Davis (“Davis”) appeals the denial of his petition for post-conviction relief, wherein he challenged his convictions for Murder and Attempted Murder. We affirm.

Issue

Davis presents a single issue for review: Whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

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

On the evening of March 20, 1999, Willie Spann and another man were drinking beer in the home of William McCloud. Sometime around 10 p.m., Davis, accompanied by Joseph Tunstill and Rodney Barnett, knocked on the front door and asked to see McCloud, who was upstairs at the time. Spann let them in the house and told them to wait. According to Spann, the three men appeared angry, and while they were waiting for McCloud, Davis dropped a gun on the floor.

When McCloud came downstairs, he ordered the men to leave. Tunstill hit McCloud on the head with an ashtray, then Davis shot McCloud once. Davis then shot Spann twice as Spann fled up the stairs to the second floor. Hearing more gunshots from downstairs, Spann smashed out a second-story window in order to escape. As he was looking out the window, he saw the three men disappearing around the corner of the house down below. He then left the house and went next door to call 911.

When the police arrived, they found McCloud lying face down in the hallway of his house. McCloud had no pulse, and when an autopsy was later performed, it revealed that he had died of multiple gunshot wounds. Officers also found shell casings, bullet holes and spent bullets. Subsequently, Spann identified Davis and Tunstill from photo arrays.

Davis v. State, No. 49A02-0106-CR-353, slip op. at 2-3 (Ind. Ct. App. March 6, 2002).

Davis was charged with Murder, Attempted Murder, and Carrying a Handgun Without a License. His first two trials resulted in a hung jury and a mistrial, respectively. On April 4, 2001, at the conclusion of a third trial, Davis was convicted of Murder and Attempted Murder. He received an aggregate sentence of one hundred five years.

His convictions were affirmed on direct appeal. See id. at 2. On March 14, 2003, Davis filed a petition for post-conviction relief, which was subsequently amended. After conducting an evidentiary hearing, the post-conviction court entered its Findings of Fact, Conclusions of Law, and order denying Davis post-conviction relief. He now appeals.

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.

Effectiveness of Trial Counsel

Davis claims that his trial attorney was ineffective because he: (1) failed to request that the jury be instructed upon lesser offenses; and (2) failed to call a particular witness.

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).

Jose Salinas (“Salinas”), who had represented Davis at each of his three trials, testified at the post-conviction hearing. Salinas testified that the theory of Davis’s defense was that

Davis was not armed and could not be the shooter. In furtherance of that defense, counsel had elicited admissions from State witnesses that there was no direct evidence that Davis fired a gun, other than Spann's testimony. Defense counsel had also challenged Spann's perception and credibility due to his alcohol and drug use. Counsel elicited Spann's admission that he had ingested cocaine, marijuana and alcohol the night before the murder, and alcohol on the day of the murder. See Davis, slip op. at 8.

Salinas testified that he had not considered a request for instruction on lesser offenses. According to Salinas, instructions on lesser offenses – particularly after Barnett and Tunstill each testified that he did not see Davis with a gun – would have undercut the theory of defense. We also observe that Davis has identified no portion of the trial record evincing a serious evidentiary dispute as to whether he acted in sudden heat or recklessly as opposed to knowingly or intentionally.¹

Counsel is to be afforded considerable discretion in the choice of strategy and tactics. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied, 537 U.S. 839 (2002).

¹ A conviction for murder does not mean that a defendant could also have been convicted of Voluntary Manslaughter. Watts v. State, 885 N.E.2d 1228, 1232 (Ind. 2008). Sudden heat must be separately proved. Id. Therefore, if there is no serious evidentiary dispute over sudden heat, it is error for a trial court to instruct a jury on Voluntary Manslaughter in addition to instructing on Murder. Id.

The element distinguishing Murder and Reckless Homicide is the defendant's state of mind. Fisher, 810 N.E.2d at 679. Reckless Homicide occurs when the defendant "recklessly" kills another human being. Ind. Code § 35-42-1-5. Murder occurs when the killing is done "knowingly" or "intentionally." Ind. Code § 35-42-1-1. Reckless conduct is action taken in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. Ind. Code § 35-41-2-2(c). By contrast, a person engages in conduct "knowingly" if the person is aware of a "high probability" that he or she is doing so. Ind. Code § 35-41-2-2(b). Accordingly, Reckless Homicide is an inherently included lesser offense of murder. Fisher, 810 N.E.2d at 679. However, the trial court need not instruct on Reckless Homicide unless there is a serious evidentiary dispute concerning the defendant's state of mind that would justify giving the lesser-included instruction had counsel tendered it. See id.

Counsel's conduct is assessed based upon the facts known at the time and not through hindsight. State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997), cert. denied, 523 U.S. 1079 (1998). We do not "second-guess" strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant's interests. Id. Trial counsel's decision not to request lesser-included offense instructions – when such instructions would have conflicted with the theory of defense – is within the range of reasonable professional norms.

Additionally, Davis contends that his trial counsel was ineffective for failing to call as a witness Ben White ("White"), whom Davis regarded as a step-father. According to White's testimony at the post-conviction hearing, he had been prepared to offer trial testimony that Tunstill was the shooter and that Davis was not present during the shooting. Salinas testified that he had no memory of interviewing White and that White's name did not appear in his public defender file. Salinas further testified that he would have interviewed anyone who could have aided Davis's defense, and if a potential witness had not been called, it would have been because he perceived that person to be unreliable or lacking in credibility.

Other evidence adduced at the post-conviction hearing indicates that White had a criminal history and had failed to give a police statement regarding McCloud's murder because he was trying to evade an outstanding arrest warrant. Davis testified that Salinas had rejected White as a witness due to the familial relationship and credibility concerns.

"A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess ... although a failure to call a useful witness can

constitute deficient performance.” Brown v. State, 691 N.E.2d 438, 447 (Ind. 1998). “Absent a clear showing of injury and prejudice, we will not declare counsel ineffective for failure to call a witness.” Osborne v. State, 481 N.E.2d 376, 380 (Ind. 1985). The post-conviction court concluded that trial counsel did not unreasonably or detrimentally reject a useful witness. We cannot say that the evidence before the post-conviction court leads unerringly and unmistakably to a contrary result.

Conclusion

Davis has not established that he was denied the effective assistance of trial counsel. Accordingly, the post-conviction court properly denied Davis post-conviction relief.

Affirmed.

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