Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Sep 19 2011, 9:35 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEYS FOR APPELLANT:

STEPHEN T. OWENS
Public Defender of Indiana

STEVEN H. SCHUTTE
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

HENRY A. FLORES, JR.
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JEFFREY DEAN WASHINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A05-1101-PC-65
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-1010-PC-377

September 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jeffrey Dean Washington appeals the denial of his petition for post-conviction relief. Washington was convicted of murder and sentenced to life without the possibility of parole. He alleges that trial counsel rendered ineffective assistance by inadequately investigating and presenting mitigating evidence at the penalty phase of trial. The post-conviction court found no ineffective assistance and denied relief. We affirm.

Facts and Procedural History

The underlying facts as reported on direct appeal are as follows:

> The recent end of a romantic relationship with the victim Sandra Bass apparently upset Washington. At some point in the late evening hours of December 5, 2001, he walked to the apartment complex where Bass lived with her three children and saw Bass and another man leaving the apartment complex in Bass' car. Bass returned a short time later, parked her car in her assigned spot and was getting out of her car when Washington confronted her. Armed with a butcher knife and wearing a pair of socks over his hands, Washington shoved Bass back into the car and stabbed her at least thirteen times. Washington fled the complex and hid the knife and his clothes in separate locations. Bass bled to death from the stab wounds. The following day, Washington was apprehended and questioned at length by the police. After an initial attempt to provide the police with an alibi for the previous night, Washington admitted stabbing Bass.
>
> The State charged Washington with murder. Alleging that he committed the murder while lying in wait, Ind. Code § 35-50-2-9(b)(3), and while on probation, I.C. § 35-50-2-9(b)(9)(C), the State also sought life imprisonment without parole.

Washington v. State, 808 N.E.2d 617, 620-21 (Ind. 2004).

At the outset of the case, defense counsel sought psychiatric evaluations of Washington for a potential insanity defense. Drs. Thomas F. Liffick and David K. Hilton each examined Washington and submitted written reports to the trial court. Dr. Liffick's report noted in part:

> Mental Health Center records indicate that Mr. Washington was first seen in April, 1979 for a court ordered evaluation because he was caught stealing. He was said at the time to have an I.Q. of 70 and was diagnosed with "Minimal Brain Dysfunction" and as having a "Conduct Disorder". He was seen again in March, 1982 because of "repeated delinquent acts". At that time, he had failed a placement at Hillcrest-Washington Youth Home and was referred to a residential treatment setting. He was seen again in October, 1994, when in fact I had discharged him from the hospital after a one night stay. At that time, he had overdosed on an antibiotic and had, at that time, just been discharged from an 8 year prison sentence for burglary and battery. He was diagnosed at that time as having an Adjustment Disorder. He was also seen in February, 1997 subsequent to an arrest for stalking. He was also given tests at that time which indicated an I.Q. in the 81-87 range with a 4th grade reading level. Personality Inventory also indicated that he exaggerated symptoms for effect. He was given a diagnosis at that time of Antisocial Personality Disorder.
>
> * * * * *
>
> Mr. Washington has a 9th grade education and was expelled from school in the 10th grade for fighting. He has had arrests previously for burglary and robbery in 1986, for voyeurism in 1995 and for stalking in 1996. . . .
>
> * * * * *
>
> The mental status is that of a well-developed, well nourished, handsome young man who appears about his stated age. . . .
>
> Thought processes are logical sequential, relevant and spontaneous. There are no indications of any autistic thinking. Thought content reveals no psychotic symptoms at any time. There are no indications of any preoccupations or other aberrations of thought content. . . .
>
> * * * * *
>
> My impression clinically is that of an ANTISOCIAL PERSONALITY DISORDER. I see no evidence of any significant psychiatric illness or otherwise. Mr. Washington has demonstrated periods in the past that could be diagnosed as periods of Adjustment Disorder in response to situational stresses. It is, in fact, possible that he was experiencing just such an adjustment disorder as a result of the loss of this relationship at the time of the events that have led to his arrest.

State's Ex. 1. And Dr. Hilton's report noted:

> Mr. Washington has a history of antisocial behavior dating back to his youth. By his report in 1982 he broke into a house, resulting in his placement at Hillcrest-Washington Youth Home. Also as a teenager, he was sent to Gebault [sic] School for Boys, reportedly for coercing another male child to perform oral sex on him. While at Gebault [sic], he allegedly

"patted" a female employee on the shoulder, resulting in an assault charge and his first stay at Indiana Boys' School. He also reportedly was sent to Boys' School on a second occasion for stealing a car stereo.

* * * * *

At 17 years of age, he was waived from juvenile to adult court on a charge of burglary and robbery. He was arrested in September, 1986 on these charges and, when convicted, served 7 years in prison, one year in jail, and 3 months on house arrest.

In 1996, he was convicted of stalking an ex-girlfriend as well as resisting arrest and escape. He spent 3 months in jail followed by approximately 4 years in prison.

Mr. Washington was first seen at the Southwestern Indiana Mental Health Center in April, 1979 when he was 10 years and 4 months of age. He underwent a psychological evaluation by Preston Phillips at the request of the Posey County Circuit Court in relation to an incident in which he had admitted to some theft.

Those records show that there was prior history of the use of Ritalin for hyperactivity symptoms, but he had been off of the medication for some time prior to the testing. It was also pointed out that there was history of inadequate parental supervision and nurturance in the home. During the testing, no attentional problems or problems with hyperactivity were observed. The WISC-R showed a full-scale IQ of 70, which was felt to demonstrate borderline intellectual functioning. His academic achievement, however, was good in relation to his intellectual ability, but was still well below what would have been expected for his grade placement.

The Bender Gestalt Test was consistent with minimal brain dysfunction (ADHD).

He was seen in therapy by Mr. Bill Curtis and was felt to be socioculturally disadvantaged, neglected, and unsupervised. His treatment diagnosis was Unsocialized Disturbance of Conduct, the old terminology for what now would be considered a Conduct Disorder.

* * * * *

Mental Status Examination

The defendant was noted to be a well developed, well nourished, 33 year old, black male in no acute distress. . . .

* * * * *

On Folstein's Mini-Mental State exam, the defendant scored a perfect score of 30 out of 30. . . .

* * * * *

> There was no evidence of fragmentation or disorganization of his form of thought. He voiced no obvious delusions. He denied ever having any history of auditory or visual hallucinations at any time in his life. He also denied ever having experienced ideas of reference, thought insertion, or thought broadcasting.
>
> * * * * *
>
> **Impression**
>
> Axis I: No definitive diagnosis, although ADJUSTMENT DISORDER WITH DEPRESSED MOOD is possible.
>
> Axis II: ANTISOCIAL PERSONALITY DISORDER
>
> * * * * *
>
> There also was some indication in his history that, contrary to his own statement, there may have been a tendency in the past toward violent behavior toward women. This is suggested by the prior arrest for stalking an ex-girlfriend and may have been related to his transform from Gebault [sic] School for Boys to the Indiana Boys' School during his youth.

State's Ex. 2. Both Drs. Liffick and Hilton concluded that Washington suffered no significant mental disease or defect that prevented him from appreciating the wrongfulness of the acts charged.

Defense counsel was also aware before trial of Washington's extensive criminal history. Washington's criminal record included juvenile delinquency adjudications for theft, trespass, burglary, and sexual abuse and adult convictions for robbery, voyeurism, escape, and stalking. One of defense counsel's main objectives at trial was to limit discussion of Washington's prior convictions as much as possible.

Washington was tried by a jury in 2002 and found guilty as charged.

Defense counsel called two witnesses in the penalty phase of trial: Washington's cousin and grandmother. They testified that before the murder, Washington had been attempting to address his anger through counseling. Defense counsel reviewed the

psychiatric evaluations performed by Drs. Liffick and Hilton but elected not to introduce them. Nor did he offer independent evidence of Washington's troubled childhood.

The jury found beyond a reasonable doubt that Washington committed the murder while lying in wait and while on probation in another case. The jury also found that those two aggravating circumstances outweighed any purported mitigators. The jury recommended a sentence of life without the possibility of parole, and the trial court sentenced Washington consistent with the jury's recommendation.

Our Supreme Court affirmed Washington's conviction and sentence on direct appeal. *See Washington*, 808 N.E.2d at 620.

Washington next sought post-conviction relief alleging ineffective assistance of counsel. Washington averred, among other things, that trial counsel rendered ineffective assistance by inadequately investigating and offering during the penalty phase evidence of his psychiatric history and abusive childhood.

The post-conviction court convened a hearing in 2010. Washington called several witnesses, including his maternal aunts, pastor, and psychologist Thomas Holsworth. Washington's aunts and pastor recounted Washington's troubled youth. They also testified that Washington assumed the role of housekeeper and babysitter and that he would assist the pastor at his farm and church. Dr. Holsworth submitted a psychological evaluation of Washington. Dr. Holsworth diagnosed Washington with several psychological, social, and intellectual impairments, but his observations were largely consistent with those of Drs. Liffick and Hilton. Dr. Holsworth noted that Washington is a "hostile individual," "tends to hold grudges," "is quick to feel that he is being treated

inequitably," "resents rules," "can act out without guilt," "does not easily learn from experience," displays a "degree of explosiveness and propensity for violence," and is unable "to participate meaningfully in some forms of treatment." Petitioner's Ex. 5.

The post-conviction court issued findings of fact and conclusions of law denying relief. The court concluded in relevant part that counsel "was aware of Mr. Washington's troubled childhood, prior criminal history and Dr. Liffick's and Dr. Hilton's evaluations. [Counsel] chose to limit, to the extent he could, the jury's knowledge of Mr. Washington's prior criminal history. Assuming arguendo, [counsel] slipped below professional norms in not obtaining and presenting a more detailed mental evaluation, there is no reasonable probability the jury would have found differently." Appellant's App. p. 102.

Washington appeals.

Discussion and Decision

The petitioner in a post-conviction proceeding bears the burden of establishing 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 unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* The post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). 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.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.* We accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.*

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* To meet the appropriate test for prejudice, the petitioner 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.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001).

Failure to investigate and present mitigating evidence at the penalty phase of trial may in some cases constitute ineffective assistance. *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007). But that is not to say that counsel is required to present any and all available mitigation evidence. *Id.* With the benefit of hindsight, a defendant can always point to

some rock left unturned to argue counsel should have investigated further. *Id.* The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that it deprived the defendant of a fair trial. *Id.* (citing *Strickland*, 466 U.S. at 686). *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)). This would interfere with the constitutionally-protected independence of counsel at the heart of *Strickland*. *Id.* Rather, we review a particular decision not to investigate by looking at whether counsel's action was reasonable in light of all the circumstances. *Id.* In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that the particular investigation is unnecessary. *Id.* at 719-20. A strategic choice not to present mitigating evidence made after thorough investigation of law and relevant facts is virtually unchallengeable, but a strategic choice made after less than complete investigation is challengeable to the extent that reasonable professional judgment did not support the limitations on the investigation. *Id.* at 720. Thus, the court's principal concern is not whether counsel should have presented more in mitigation but whether the investigation supporting their decision not to introduce mitigating evidence was itself reasonable. *Id.*

Here we agree with the post-conviction court that Washington fails to sustain a showing of ineffective assistance. First, we cannot say that trial counsel's performance was deficient. Counsel sought psychiatric evaluations of Washington at the beginning of the case and reviewed the reports for purposes of sentencing. Counsel chose not to

introduce Washington's psychiatric evaluations during the penalty phase, and that decision was more than justifiable. Washington's evaluations revealed a history of antisocial behavior and aggression toward women, yet no significant and present mental disability. As a result, introduction of the psychiatric evidence likely would have been unavailing and even disadvantageous. Counsel also acted reasonably in not offering childhood-related testimony from Washington's aunts or pastor, who in part characterized Washington as a housekeeper, babysitter, and assistant at the farm and church. Counsel's concern throughout trial was that the jury would be exposed to Washington's formidable criminal history. While evidence of Washington's troubled youth likely would not have opened the door to prior convictions, any testimony portraying him as a "helper" or "protector" could have. *See, e.g.*, *Allen v. State*, 749 N.E.2d 1158, 1173 (Ind. 2001) ("While the evidence of Allen's family history describes the difficult conditions of his childhood, it also contains numerous positive references to Allen's role as a protector of the younger children in his neighborhood and family, his role as 'man of the house,' his tendency to take blame for others, and his practice of stealing to feed his family. This testimony—which was intertwined with the negative aspects of Allen's youth—is a form of character evidence that could open the door to Allen's criminal history. Trial counsel's performance was not deficient for not presenting this evidence."), *reh'g denied*. Counsel was therefore warranted in foregoing the character evidence altogether. *See id.*; *see also* 1 F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* § 32:24 (2009) ("During the cross-examination, the prosecutor may ask a character witness if he or she has ever heard particular rumors or

reports derogatory to the defendant's reputation. . . . If your character witnesses are open to any such attack, do not put them on the stand."). Finally, even if we assumed *arguendo* that counsel was deficient for failing to introduce the mitigation evidence desired, we would still find an insufficient showing of resultant prejudice. The jury found beyond a reasonable doubt that Washington committed the murder while lying in wait and while on probation for another offense. The omitted character testimony from Washington's aunts and pastor was neither substantial nor overwhelmingly favorable. And while Dr. Holsworth's evaluation included more diagnoses than Dr. Liffick's or Dr. Hilton's, it disclosed the same litany of antisocial and unsympathetic behaviors. It is thus unclear that Washington would have benefitted from the evaluation's introduction had it been procured for trial. Accordingly, we find no reasonable probability that, but for counsel's alleged omissions, the jury would have weighed the aggravators and mitigators differently and the outcome of Washington's proceeding would have been different.

For the reasons stated, we find no ineffective assistance of counsel and affirm the post-conviction court's order denying relief.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.