Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-448

JULY TERM, 2009

In re Nate Peatman	}	APPEALED FROM:
	}	
	}	Orange Superior Court
	}	
	}	DOCKET NO. 123-6-06 Oecv
		Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Petitioner appeals from a superior court order denying his petition for post-conviction relief. He contends the court erred in rejecting a claim of ineffective assistance of counsel based upon his attorney's failure to file written objections to information contained in the presentence investigation report (PSI). We affirm.

In 2004, petitioner was charged with multiple counts of assault stemming from three separate incidents. In May of that year, he was charged in Orange County with aggravated domestic assault on his sister Ellie, domestic assault on his niece, and simple assault on her boyfriend. On the same day, he was charged in Washington County with second degree domestic assault on his wife, simple assault on a police officer, and resisting arrest. Petitioner had four prior convictions for assault and one for resisting arrest at the time of the offenses.

In July 2004, petitioner pled guilty to the Washington County charges and was sentenced to concurrent sentences of thirty days to one year to serve. In November 2004, while on furlough from this sentence, petitioner was involved in a third incident which resulted in charges of second degree domestic assault on his sister Melodie, as well as obstruction of justice and violating his conditions of release. He was reincarcerated that month, and remained incarcerated while a plea agreement was negotiated by his attorney, Dan Sedon, on the pending Orange County charges and the new charges. Under the agreement, petitioner agreed to plead guilty to the two charges of domestic assault on his sisters, and the State agreed to dismiss the other charges and recommend concurrent sentences of eighteen months to five years to serve, with petitioner free to argue for a lesser sentence. In January 2005, the district court accepted petitioner's guilty plea at a change-of-plea hearing, indicated that petitioner would be free to withdraw the plea if the court subsequently imposed a higher sentence, and ordered a PSI. Petitioner retained a clinical psychologist, Dr. Kinsler, to conduct a forensic evaluation for submission at sentencing.

Defendant was sentenced on March 2005. At the sentencing hearing, the district court explained that—based on a chambers conference with counsel and discussions between the parties—it had decided to impose a sentence higher than the eighteen months to five years to serve recommended by the State but lower than the three-to-ten years recommended by the PSI. The court further explained that, after reviewing both the PSI and Dr. Kinsler's report, it had decided to impose a sentence of two-to-eight years to serve on one of the domestic assaults—principally in order to provide a sufficient minimum term necessary for petitioner to complete a cognitive self-change program (a.k.a. the "violent offenders programs") as an inmate—and to impose a concurrent zero-to-five year

sentence, all suspended, on the other domestic assault charge. Petitioner accepted the sentence. In a subsequent statement to the district court, however, petitioner complained that the PSI failed to accurately convey his remorse, contained statements by the victims that were inaccurate, and distorted a resisting-arrest charge. Attorney Sedon went on record to explain that he had made a tactical choice not to file written objections to the PSI but to make any corrections at the hearing through cross-examination, which was now unnecessary in light of the resolution agreed to by the State and defendant.

In November 2007, petitioner filed an amended petition for post-conviction relief alleging that attorney Sedon had rendered ineffective assistance of counsel by failing to submit written objections to the PSI as authorized by Vermont Rule of Criminal Procedure 32(c)(4). Petitioner claimed that counsel's "general failure to object to the PSI" improperly allowed the district court to assume that all of the information contained therein was accurate, and also claimed that the failure to correct four particular statements was ineffective. Specifically, he asserted that counsel should have objected to: (1) information concerning a charge of resisting arrest which was dismissed; (2) an allegedly inaccurate statement that petitioner's doctor noted an increase in anger when petitioner used alcohol; (3) an allegedly inaccurate statement that defendant had denied he was a violent person; and (4) an allegedly inaccurate rendition of the events surrounding the assault on his sister Melodie, and an inaccurate description of the assault as "unprovoked."

The superior court held a hearing on the motion in April 2008, in which attorney Sedon, petitioner, and two experts testified. In addition to the claims set forth in the amended petition, petitioner also claimed that he was prejudiced by a statement in the PSI that petitioner was interviewed in a "maximum security" unit; its failure to accurately convey that, prior to the assault on his sister Melody, she had grabbed petitioner's son and threatened to report his use of drugs and alcohol to his parole officer; its failure to describe what had led to the assault on his other sister; and by several additional alleged inaccuracies.

The superior court issued a written decision in September 2008, denying the petition. Based on the testimony of attorney Sedon—which the court found to be credible—and an expert trial lawyer, the superior court found that Sedon had thoroughly reviewed the PSI and discussed it with petitioner; that Sedon generally thought it was more effective to highlight any minor inaccuracies through cross-examination rather than written objections; and that Sedon's strategy coming into the hearing was to minimize any impression that petitioner was blaming the victims or claiming to have been reasonably provoked. Based thereon, the superior court concluded that the decision not to file objections was a reasonable strategic choice, as they were either insignificant to the sentencing decision or might have undermined counsel's strategy by suggesting that petitioner lacked insight into his assaultive behavior and blamed the victims for the assaults. Accordingly, the court determined that the decision not to file objections was within the range of professional competence.

The superior court also concluded that, even if somehow erroneous, there was no reasonable probability that the failure to file objections had any effect on the sentence imposed. The sentencing court made no mention of any of the allegedly inaccurate information in imposing sentence. Rather, as noted, the superior court explained that the sentence was chosen to provide sufficient time for cognitive self-help programming. Furthermore, as the court here observed, there was "overwhelming" evidence in Dr. Kinsler's evaluation—entirely apart from anything in the PSI—that petitioner was an angry and violent person with a significant need for such programming to help him gain insight and control his anger. The forensic evaluation described petitioner's chronic tendency to see himself as the victim; noted that he did not perceive his violence to be a problem; reported that he tested extremely high for anger and being provoked to anger; described petitioner as a high risk for further violence; and recommended cognitive behavioral therapy. As for the alleged inaccuracies in the PSI concerning

petitioner's assaults on his sisters, the forensic evaluation also contained a summary of petitioner's version of the events, noting that he viewed his actions as the result of provocations by others.

It is well settled that "a petitioner seeking post-conviction relief based on ineffective assistance of counsel must demonstrate first that counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms and second, that counsel's deficient performance prejudiced the defense." In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 635 (mem.) (quotation omitted). Petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quotation omitted). The court's findings in a PCR proceeding will not be disturbed absent a showing of clear error, and its conclusions will be affirmed if supported by the findings. Id.

Assessed in light of these standards, we find no basis to disturb the judgment. Petitioner relies on the testimony of his expert witness at the hearing to assert that counsel was ineffective in failing to review the entire PSI with petitioner, and that reviewing it with petitioner on the morning of the hearing left insufficient time to file written objections. The superior court found, however, that attorney Sedon had reviewed "each section [of the PSI] with petitioner" by telephone in advance of the hearing, and further found that petitioner's claim that he had not had the opportunity to review it before the hearing lacked credibility and was contradicted by statements he made at the sentencing hearing. It is the province of the superior court to weigh conflicting evidence and the credibility of witnesses, and we find no basis here to conclude that its findings were clearly erroneous. In re Calderon, 2003 VT 94, ¶ 13, 176 Vt. 532. As for the expert's opinion, the superior court here noted that it was based on petitioner's version of the facts, which the court rejected as not credible.

Nor do we discern any basis to disturb the superior court's conclusion that counsel's decision not to file written objections was a reasonable tactical decision well within the bounds of professional competence. See In re Dunbar, 162 Vt. 209, 212 (1994) ("Trial counsel are permitted a great deal of discretion in decisions regarding trial strategy" even if the choice is unsuccessful.). The State's expert witness here corroborated attorney Sedon's view that it would have been detrimental to file written objections to alleged inaccuracies in the PSI that were either minor or that would have undermined counsel's efforts to minimize criticism of the victims; indeed, the expert noted that the ultimate sentence—an additional six months to the agreed minimum—was favorable to petitioner in light of his extensive criminal history. The court also reasonably concluded that there was no probability of a different result absent the allegedly negligent omissions; the alleged inaccuracies in the PSI were either immaterial to the sentence or were refuted in the forensic evaluation. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice