

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-034

JULY TERM, 2006

In re Daren Austin

} APPEALED FROM:

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Washington Superior Court

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DOCKET NO. 350-6-05 Wncv

Trial Judge: Helen M. Toor

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

Petitioner Daren Austin appeals from the trial court's order granting summary judgment to the State on his petition for post-conviction relief. He argues that the trial court erred because: (1) it improperly evaluated whether he received ineffective assistance of counsel at trial; and (2) there were material facts in dispute. We affirm.

Petitioner was convicted of domestic assault after a jury trial. He filed a petition for post-conviction relief, asserting that his trial attorney was ineffective because he failed to pursue a necessity defense. Specifically, petitioner argued that his behavior was justified because he was trying to prevent the victim from driving while

intoxicated. The State moved for summary judgment, and the court granted its request. In reaching its decision, the court recounted the following evidence from petitioner=s trial. On the evening of the assault, petitioner and his girlfriend, Marissa Cooney-Moore, were drinking at various bars. At their last stop, petitioner left the bar on foot without Ms. Cooney-Moore. She followed him in her car. She was intoxicated and acknowledged that she should not have been driving. Ms. Cooney-Moore located petitioner, and he got into the car. They talked about why he had left the bar without her. Petitioner indicated that he was jealous that Ms. Cooney-Moore was talking to the bar owner. Ms. Cooney-Moore was angry and said that she was leaving. Petitioner grabbed the keys from the ignition and exited the car. Ms. Cooney-Moore testified that petitioner took the keys because he felt that they needed to resolve their dispute right then; he did not express any concern that she was too drunk to drive.

Ms. Cooney-Moore got out of the car and tried to get her keys back. Petitioner would not give them to her so she began walking. Petitioner then grabbed her, restrained her, and they struggled. Ms. Cooney-Moore fell to the ground. Petitioner said that he was going to hurt her. He reached for her head area, and Ms. Cooney-Moore bit his finger. They both got up, and she began to walk away. Petitioner then grabbed her, picked her up, and dropped her to the ground, where she hit her head. A woman who lived nearby testified that she awoke to a woman screaming, Aplease don=t hurt me, don=t hurt me,@ and a man screaming, Al=m going to hurt you@ over and over again. She roused her husband, who also heard a woman scream Ahelp me.@ He told his wife to call 9-1-1. He then went outside and found Ms. Cooney-Moore with a Agood-sized egg on her head.@ Petitioner admitted to police that he said, Al=m going to hurt you.@ He claimed that Ms. Cooney-Moore attacked him after she got out of the car and bit his finger. He could not explain the bump on her head. He finally admitted pushing her once. He did not indicate that he was concerned Ms. Cooney-Moore could not drive safely in her intoxicated state.

With this evidence in mind, the court evaluated petitioner=s claim that he had suffered prejudice due to his trial counsel=s allegedly ineffective representation. Petitioner argued that his trial counsel should have raised a necessity defense and requested a jury instruction on this defense. According to petitioner, his attorney should have had him testify that he intended to prevent Ms. Cooney-Moore from operating her car because she was

drunk and he had acted to prevent injury or death when he struggled with her over the car keys. The trial court rejected this argument. It found that, even assuming that counsel=s performance was deficient, petitioner could not establish prejudice, that is, there was no reasonable probability that but for counsel=s errors, the proceedings would have turned out differently. The court explained that, even if the jury believed petitioner=s proffered testimony about trying to protect the victim, the necessity defense would have applied only to the point where petitioner took the keys from Ms. Cooney-Moore. The evidence at trial, however, was that on two separate occasions after he already had the keys, petitioner restrained Ms. Cooney-Moore from leaving on foot. Thus, there was no evidence from which a jury could reasonably find that there was any Anecessity@ for his actions once petitioner had the keys.

Moreover, the court explained, petitioner=s story was entirely undercut by the independent evidence from the neighbors as well as petitioner=s own admission that he said Al=m going to hurt you.@ The court also found petitioner=s story weakened by evidence that: (1) he told Ms. Cooney-Moore that she needed to stay so they could resolve their dispute; (2) he never told her that he was concerned about her driving given how much she=d had to drink; and (3) he never mentioned to police at the time that he was trying to prevent her from driving because she was drunk. Given the weight of the evidence against petitioner, the court explained, he failed to establish a reasonable probability that a different approach by counsel would have led to acquittal. The court therefore granted summary judgment to the State. Petitioner appealed.

On review of the trial court=s summary judgment decision, we apply the same standard as the trial court. ASummary judgment is appropriate when there are no genuine issues of material fact and, viewing the evidence in a light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law.@ In re Carter, 2004 VT 21, & 6 (citation omitted).

Petitioner first suggests that the trial court applied the wrong standard to evaluate whether he suffered prejudice from trial counsel=s alleged error. According to petitioner, the trial court placed an Aimpossible burden@ on him by requiring him to show that but for counsel=s error, the outcome of the proceedings would have been different.

This claim of error is without merit. It is well-established that to sustain his claim of ineffective assistance of counsel, petitioner needed to show by a preponderance of the evidence that: A(1) his counsel=s performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there was a reasonable probability that, but for counsel=s unprofessional errors, the proceedings would have resulted in a different outcome.@ In re Koveos, 2005 VT 28, & 6 (mem.) (quotation omitted). The record plainly demonstrates that the trial court employed the proper legal standard in evaluating petitioner=s claim. As the trial court explained, even if a necessity defense had been presented to the jury, it would not have justified petitioner=s repeated assault of the victim after he obtained her car keys. See State v. Shotton, 142 Vt. 558, 560-61 (1983) (elements of the necessity defense are: (1) a situation of emergency arising without fault on the part of actor concerned; (2) the emergency is Aso imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting@; (3) emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and (4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong). It is illogical to argue that petitioner needed to pick up the victim and drop her to the ground to prevent her from driving while intoxicated. The court properly concluded that petitioner was not prejudiced by counsel=s failure to pursue a necessity defense.

Petitioner next argues that summary judgment was inappropriate because there were material facts in dispute. He points to an affidavit that he submitted, which outlined testimony that he would have offered at trial to support his necessity defense. Petitioner also maintains that the trial court improperly assessed his credibility and the credibility of other witnesses in reaching its summary judgment decision. These arguments are without merit. As explained above, even if a jury believed petitioner=s proffered testimony about the evening=s events, it would not have provided a defense to his additional assaults on the victim. Summary judgment was appropriately granted to the State.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice