

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-339

NOVEMBER TERM, 2020

In re Eric Daley*

} APPEALED FROM:

}

} Superior Court, Windsor Unit,
} Civil Division

}

} DOCKET NO. 167-4-16 Wrcv

Trial Judge: Timothy B. Tomasi

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

Petitioner appeals the decision of the civil division denying his petition for post-conviction relief (PCR). We affirm.

The trial court found the following facts. In June 2003, petitioner was stopped for speeding by Vermont State Police Trooper Michael Smith while traveling southbound on Interstate 91.* Trooper Smith took petitioner's paperwork, went to his cruiser, and after five or six minutes, returned to ask petitioner a series of investigative questions. He asked petitioner five to seven times for consent to search petitioner's vehicle, and petitioner repeatedly refused. Both men became somewhat agitated. Trooper Smith issued petitioner tickets for speeding and not wearing a seatbelt. He started to return to his cruiser, then turned back to petitioner and told him to wait. Petitioner noticed that there was a second cruiser behind Trooper Smith's. Trooper Smith told petitioner that they were calling a canine unit to check his car for illegal substances. Petitioner told the officers that they could not do that because he had done nothing wrong. At the time, petitioner had marijuana, ecstasy, and LSD in the trunk of his car.

After unsuccessfully trying to reach his New Hampshire attorney, petitioner drove off at a high rate of speed in the southbound lane of Interstate 91. The officers pursued petitioner in their cruisers as he reached speeds up to 120 miles per hour. They were unable to catch up to petitioner, who was weaving in and out of traffic. Another officer, Sergeant Johnson, laid down a spike mat, which was designed to puncture tires of fleeing vehicles, on the highway. When petitioner encountered traffic backed up from the spike mat, he chose to drive into the median. He lost control of his vehicle and struck and killed Sergeant Johnson. Petitioner left his car and escaped on foot into the woods. With the assistance of friends, he fled to Pennsylvania, where he was

* At the PCR merits hearing, petitioner stipulated to the facts regarding the incident that led to petitioner's arrest as they were recited by this Court in its decision in State v. Daley, 2006 VT 5, ¶¶ 2-4, 179 Vt. 589 (mem.).

eventually arrested. A subsequent search of defendant's vehicle revealed several bags of marijuana and smaller amounts of LSD and Ecstasy.

Petitioner was charged with seven counts: grossly negligent operation of a motor vehicle with death resulting, leaving the scene of an accident with death resulting, attempting to elude a police officer, second-degree murder, and three counts of possession of illegal drugs. Attorney Matthew Harnett was appointed to represent him. Harnett negotiated a plea deal with the State under which petitioner agreed to plead guilty to the first three counts as well as involuntary manslaughter, felony possession of marijuana, possession of LSD, and possession of Ecstasy. The parties agreed that the State could argue for a sentence of up to thirty-three years, and petitioner could argue for any lawful sentence. Petitioner obtained three important concessions in exchange for his guilty plea: the federal government agreed not to prosecute petitioner, which could have led to petitioner receiving the death penalty; the State agreed not to seek life imprisonment or charge petitioner with a presumptive twenty-year minimum; and the State of New Hampshire agreed not to prosecute petitioner for unrelated felonies that might have resulted in consecutive jail sentences.

After a lengthy sentencing hearing at which petitioner testified, the court imposed an aggregate sentence of twenty-six-to-thirty-three-years' imprisonment. This Court affirmed the sentence on direct appeal. Daley, 2006 VT 5, ¶ 13.

In April 2016, petitioner filed this PCR petition asserting that he received ineffective assistance of counsel because attorney Harnett: (1) failed to research or file a motion to suppress and dismiss based on the officers' allegedly illegal expansion of the traffic stop into a drug investigation; (2) did not move to suppress evidence following the deployment of the spike mats on the ground that that deployment constituted an unconstitutional seizure; and (3) inadequately prepared petitioner for his testimony and allocution and recommended that he testify on his own behalf, which allowed him to be subjected to damaging cross-examination by the State's attorney.

Following a merits hearing at which petitioner and the State presented expert testimony, the PCR court issued a lengthy decision denying the petition. The court began by noting that Harnett, who died in 2012, had extensive experience as a criminal defense attorney, was viewed as competent, and had served as a resource for both consultation and referrals for other attorneys. With regard to the first claim raised by petitioner, the court found that Harnett considered filing a motion to suppress, but made a strategic decision not to do so and instead to raise the issues as mitigating factors for the court to consider at sentencing. The court found that this was a reasonable decision given the high-profile nature of the case, since such a motion might have been perceived by the public and the State as an attempt to blame the police for the events leading to petitioner's arrest. The court also found that petitioner had failed to demonstrate prejudice resulting from the decision because there was not a reasonable probability that the filing of a motion to suppress and dismiss would have been successful or resulted in a different outcome.

The court likewise rejected petitioner's second claim of error, which was that Harnett failed to file a motion to suppress evidence of the events that occurred after the deployment of the spike mats, which petitioner argued was an unconstitutional seizure. The court found that the deployment of the mats likely amounted to a seizure or an attempted seizure. However, it found that a motion to suppress on this basis would probably have been unsuccessful. It concluded, citing recent U.S. Supreme Court precedent, that the use of the spike mats was not unreasonable, and therefore not unconstitutional, because petitioner posed an imminent threat of serious physical harm to other users of the highway and to the pursuing police officers. The court noted that the

same strategic considerations for not moving to suppress based on the expansion of the initial stop would have applied to the decision whether to move to suppress based on the use of the mats. The court stated that it could not conclude that “the outcome of the proceeding would have, with reasonable probability, been different” if Harnett had filed such a motion because the motion was unlikely to succeed and, rather than encouraging the State to have offered petitioner a better plea agreement, may have caused the State to pursue harsher penalties.

Turning to petitioner’s third argument, the court rejected petitioner’s claim that Harnett failed to prepare him for his testimony at sentencing or advise him of his right of allocution, which it found not to be credible based on the evidence presented. However, the court found that Harnett likely recommended or at least supported petitioner’s decision to testify at sentencing. The court stated that it was a “close call” as to whether the advice to testify fell below the professional standard of care, but ultimately concluded that it was a reasonable strategic decision. The court noted several difficulties the defense faced at sentencing: a devastating presentence investigation report that showed a serious risk of re-offending; evidence presented by the State concerning petitioner’s apparent disregard for the safety of others, status as a drug dealer, and criminal record, which included a previous hit-and-run; the presence of Sergeant Johnson’s family and many other police officers at the hearing; and intense media coverage. The court found that the decision to have petitioner testify could be justified as an effort to “humanize” petitioner to the court, and that petitioner was able to present positive evidence about his background and efforts at rehabilitation. It also allowed him to read out loud a “clearly thought out” apology, take responsibility for Sergeant Johnson’s death, and express remorse.

The court further found that, even if Harnett acted unprofessionally in advising petitioner to testify, petitioner failed to demonstrate that he was prejudiced by the error. Although the prosecutor obtained admissions from petitioner during cross-examination, they concerned facts that were not really in dispute, having already been presented through other evidence. And while petitioner “sparred” with the prosecutor over the propriety of the extension of the traffic stop, the sentencing court was already aware, through sentencing memoranda, of petitioner’s position that the stop was illegal and that police carried some of the blame for Sergeant Johnson’s death. Finally, the PCR court did not find it reasonably probable that but for defense counsel’s strategy, the result of the sentencing proceeding would have been different, noting petitioner’s prior record involving a similar offense, his numerous opportunities to stop the chase and avoid the crash, and his decision to flee the scene. The court pointed to the sentencing judge’s opinion, which contained only positive references to petitioner’s testimony, as the best evidence that the decision to testify did not prejudice petitioner. The sentencing court focused instead on petitioner’s record and his personal conduct in fashioning its sentence and did not mention petitioner’s lack of candor or his argument with the State’s attorney. The court therefore denied the petition.

On appeal, petitioner first argues that the PCR court applied an improperly high standard of proof in addressing whether attorney Harnett’s failure to file motions to suppress evidence challenging the extension of the initial stop and the deployment of the spike mat was prejudicial to petitioner. To overturn a conviction on the ground of ineffective assistance of counsel, a petitioner must first prove by a preponderance of the evidence that their attorney’s performance “fell below an objective standard of reasonableness informed by prevailing professional norms.” In re Dunbar, 162 Vt. 209, 212 (1994) (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). A petitioner who meets that burden must then show that the attorney’s “deficient performance prejudiced the defense.” Strickland, 466 U.S. at 687. To demonstrate 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.* at 694; see also *In re Sharrow*, 2017 VT 69, ¶ 9, 205 Vt. 309 (explaining that standard set forth in *Strickland* “has guided the [U.S.] Supreme Court’s, and this Court’s, evaluation of ineffective assistance claims since that time”).

Petitioner’s claim is unavailing because he does not challenge the court’s determination that Harnett’s failure to file motions to suppress did not constitute an unprofessional error and therefore did not satisfy the first prong of the *Strickland* test. Because petitioner did not meet his burden of demonstrating that the attorney’s alleged error fell below professional standards, it was unnecessary for the court to consider prejudice. See *Dunbar*, 162 Vt. at 216 (declining to reach issue of prejudice where defendant failed to meet burden on first prong of *Strickland* test). Accordingly, any error in the PCR court’s recitation of the prejudice standard was harmless.

Petitioner’s second claim on appeal is that the PCR court erred in concluding that Harnett’s advice to petitioner to testify at the sentencing hearing did not constitute an unprofessional error. Petitioner argues that there was nothing to be gained by testifying because all the positive points identified by the PCR court could have been made without risk through allocution.

As the PCR court explained, “[t]rial counsel are permitted a great deal of discretion in decisions regarding trial strategy, and even the failure of that strategy is not the standard by which a reviewing court will measure trial counsel’s competence.” *Dunbar*, 162 Vt. at 212. “Instead, we must assess whether counsel’s decisions were within the range of competence demanded of attorneys in a criminal case at that time.” *In re Combs*, 2011 VT 75, ¶ 10, 190 Vt. 559 (quotation omitted). “ ‘Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ ” *In re Pernicka*, 147 Vt. 180, 183 (1986) (quoting *Strickland*, 466 U.S. at 689). We review the PCR court’s assessment of attorney conduct with deference, meaning that we will uphold its findings of fact absent clear error and will affirm its judgment if supported by the findings. *In re Russo*, 2010 VT 16, ¶ 17, 187 Vt. 367.

The PCR court found that there were two potentially positive aspects to having petitioner testify: first, it could “humanize” petitioner to the court, and second, it allowed Harnett to lead petitioner through positive testimony about petitioner’s background and efforts at rehabilitation, and to admit exhibits supporting these points. The court found that this was a reasonable strategy given the difficulties faced by the defense at sentencing, and it was plainly something that Harnett considered in advance rather than an off-the-cuff decision because his co-counsel testified that she had discussed it with him in advance and had opposed the decision. The court noted that Harnett was an experienced criminal defense attorney who was considered by petitioner’s expert to be generally competent in the cases where they worked together.

These findings are supported by the testimony of the State’s expert. They in turn support the court’s conclusion that the attorney’s strategy, though “uncommon,” fell within the range of competence required of criminal defense attorneys at that time. See *Dunbar*, 162 Vt. at 213 (explaining that “proper question is whether trial counsel had any reasonable strategy and whether they pursued it with adequate preparation and diligence”; if so, petitioner cannot meet first prong of *Strickland* test by showing that, in hindsight, strategy was unsuccessful); see also *Combs*, 2011 VT 75, ¶ 9 (explaining this Court will not disturb PCR court’s findings “if they are supported by any credible evidence, and even when the evidence is conflicting, we defer to the trial court’s judgment”). Furthermore, even if the trial court erred in concluding that the attorney’s decision fell within professional standards, petitioner does not challenge the court’s conclusion that he had

failed to demonstrate prejudice resulting from the alleged error. We therefore will not disturb the court's decision.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice