

17CA0600 Peo v Yazzie 11-08-2018

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA0600
La Plata County District Court No. 07CR298
Honorable Douglas S. Walker, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Carlton L. Yazzie,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE LICHTENSTEIN
Dailey and Ashby, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced November 8, 2018

Cynthia H. Coffman, Attorney General, Ryan A. Crane, Senior Assistant
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¶ 1 Defendant, Carlton L. Yazzie, appeals the district court's order denying his postconviction motion. We affirm.

I. Background

¶ 2 On June 7, 2007, police found a woman's body in a motel room in Durango, Colorado. She had died from injuries sustained during a sexual assault that occurred the previous evening in the motel room.

¶ 3 Yazzie and two other men had been in and out of the motel room throughout that evening. The woman was extremely intoxicated and had been subjected to vaginal intercourse with blunt physical force that had caused severe injuries to the internal walls of her vagina that ultimately led to her death. When Yazzie was initially stopped by police in connection with the woman's death, he lied about his identity.

¶ 4 Yazzie was charged with felony murder, three counts of sexual assault based on three distinct theories, and false reporting. The two other men were also charged as codefendants.

¶ 5 Yazzie's case separately proceeded to a jury trial. The central issue at trial was the timing of the woman's injuries and resulting death, and thus, whether Yazzie was in the motel room at the time

of the infliction of the injuries. The People called the coroner, Dr. Carol Huser, who testified as an expert in forensic pathology. She estimated that the woman was initially injured as early as 6:30 p.m., was subjected to repeated injurious penetrations over a period of time, and ultimately died at approximately 2:30 a.m. the following morning. From this evidence — as well as evidence that the victim’s blood was on Yazzie’s boxer shorts and pants, and Yazzie’s blood was on the victim’s panties — the prosecution argued that Yazzie was present in the motel room and caused the injuries.

¶ 6 The jury found Yazzie guilty of sexual assault causing serious bodily injury of a victim incapable of appraising the nature of her conduct and false reporting. He received an indeterminate sentence of forty-eight years to life in the custody of the Department of Corrections. On appeal, a different division of this court affirmed his conviction. *People v. Yazzie*, (Colo. App No. 08CA2449, July 29, 2010) (not published pursuant to C.A.R. 35(f)).

¶ 7 Following this appeal, Yazzie, through an attorney, filed a motion for postconviction relief under Crim. P. 35(c), asserting several errors by trial counsel. The postconviction court denied all but one claim. It granted Yazzie a hearing on his assertion that

trial counsel was constitutionally ineffective for failing to consult with and present testimony from an expert in forensic pathology.

¶ 8 At the hearing, postconviction counsel presented the testimony of Dr. Gregg Davis, who is an expert in forensic pathology. He agreed with some of Dr. Huser's conclusions but questioned the methods she used to estimate the timing of injuries and death. As pertinent here, he opined that the woman's injuries may have been inflicted hours later than Dr. Huser estimated.

¶ 9 Trial counsel did not testify at the postconviction hearing, but both Yazzie and the People presented testimony from legal experts in criminal defense. These experts reviewed trial counsel's pretrial pleadings in the case, which showed that trial counsel had filed a pretrial motion seeking a continuance and funds to hire a forensic pathologist as a trial expert. The files did not establish that counsel thereafter consulted with such an expert. And counsel did not ultimately present testimony of a competing expert to rebut Dr. Huser's conclusions concerning the timing of the injuries and resulting death.

¶ 10 The legal experts noted that Yazzie's trial counsel had access to the codefendants' interviews of Dr. Huser and relevant medical

literature. These experts reviewed the cross-examination of Dr. Huser at trial and also compared Dr. Davis' testimony at the postconviction hearing to Dr. Huser's testimony at trial. They then reached opposite conclusions as to whether trial counsel's decision not to consult with or present testimony from an expert in forensic pathology was an objectively reasonable strategic decision and whether Yazzie was prejudiced by it.

¶ 11 After the hearing, the parties submitted written closing arguments. The postconviction court then issued a written order denying Yazzie's motion. Yazzie appeals this order.

II. Discussion

¶ 12 Yazzie asserts that the postconviction court erred in denying his motion because the evidence showed that trial counsel's failure to consult with and present testimony of a forensic pathologist was ineffective. We are not persuaded that counsel's representation was ineffective.

A. Standard of Review and Applicable Law

¶ 13 In reviewing a Crim. P. 35(c) claim, we presume the validity of a conviction and the defendant bears the burden to prove he is entitled to relief. *Dunlap v. People*, 173 P.3d 1054, 1061 (Colo.

2007). When the denial of a motion for postconviction relief follows an evidentiary hearing, we defer to the district court's factual findings and credibility determinations, but we review its conclusions of law de novo. *Carmichael v. People*, 206 P.3d 800, 807–08 (Colo. 2009).

¶ 14 A criminal defendant is constitutionally entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003). To be entitled to reversal of a conviction as the result of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation was deficient and (2) that counsel's deficient performance prejudiced the defense. *Id.*

¶ 15 If a court determines that a defendant has failed to prove either prong of the *Strickland* analysis, it may deny an ineffective assistance claim without addressing the other prong. *People v. Washington*, 2014 COA 41, ¶ 20.

B. Deficient Performance

¶ 16 Yazzie contends that trial counsel's decision not to consult with or present testimony from an expert in forensic pathology

constitutes deficient performance. For the reasons stated below, we disagree.

¶ 17 To demonstrate deficient performance, a defendant must first show, by a preponderance of the evidence, that his attorney's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88, 694; *Ardolino*, 69 P.3d at 76.

¶ 18 As pertinent here, trial counsel has a duty to reasonably investigate a client's case. *People v. Newmiller*, 2014 COA 84, ¶ 45 (citing *Strickland*, 466 U.S. at 691). A reasonable investigation is one sufficient to reveal potential defenses and facts relevant to guilt. *Id.* (citing *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994)).

¶ 19 While counsel has a duty to make a reasonable investigation, *Dunlap*, 173 P.3d at 1065, strategic choices made after thorough investigation are “virtually unchallengeable.” *Ardolino*, 69 P.3d at 76. Included among those strategic choices is determining what witnesses to endorse and call. *See Davis*, 871 P.2d at 773. Particularly, trial counsel may reasonably decline to introduce expert testimony, even if that testimony may have supported the defense. *Harrington v. Richter*, 562 U.S. 86, 107–08 (2011); *see also People v. Aguilar*, 2012 COA 181, ¶ 12.

¶ 20 Because a court has the advantage of hindsight, scrutiny of counsel’s performance must be highly deferential, and it should begin with a presumption that counsel’s conduct fell within the “‘wide range’ of reasonable professional assistance.” *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689); see *Ardolino*, 69 P.3d at 76; *People v. Fulton*, 754 P.2d 398, 400 (Colo. App. 1987) (“Judicial scrutiny of counsel’s performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight.”).

¶ 21 Here, the postconviction court found that trial counsel had sufficiently investigated the case by obtaining articles related to the timing of injuries — including one authored by Dr. Huser — as well as a transcript of an interview of Dr. Huser conducted by counsel for one of Yazzie’s codefendants. The court found that Yazzie did not prove that counsel’s decision (not to consult with or present testimony from an expert) was not one of trial strategy after sufficient investigation. It found that it was “entirely possible that the attorney felt that he had enough information to cross-examine [Dr. Huser] based upon the interview conducted by counsel for the codefendant and counsel exhibited a clear knowledge of the medical

issues in his cross-examination.” Indeed, review of the trial transcripts confirms that, through cross-examination, trial counsel elicited from Dr. Huser that she could not say with certainty how the woman’s injuries occurred or what type of object caused them. Additionally, Dr. Huser repeatedly acknowledged that she could only approximate the time of death and that this estimate was not certain. Counsel elicited that the doctor’s estimates on the available medical information regarding wound healing were limited due to the impracticability of conducting studies on live humans. Counsel also elicited that there existed no literature support for the doctor’s position regarding the effects of the dying process on wound healing and that different bodies can react differently during that process. Indeed, the only certainty Dr. Huser could testify to was that the woman was dead when paramedics arrived.

¶ 22 True, Dr. Huser did assist trial counsel with the pronunciation of a medical term during cross-examination. But flawless legal representation is not guaranteed; rather, a defendant is entitled to “reasonably effective assistance.” *Ardolino*, 69 P.3d at 76.

Representation is deficient only if it “so undermined the proper

functioning of the adversarial process” that the defendant was denied a fair trial. *Id.*

¶ 23 Here, however, we agree with the postconviction court that Yazzie did not prove that his trial counsel’s decisions regarding consulting and calling an expert might not have been strategic decisions “after sufficient investigation.” Indeed, these decisions did not prevent counsel from meaningfully challenging Dr. Huser’s conclusions. *See Richter*, 562 U.S. at 111 (“In many instances cross-examination will be sufficient to expose defects in an expert’s presentation.”).

¶ 24 For these reasons, we conclude that trial counsel’s performance was not deficient. Accordingly, we need not address whether Yazzie demonstrated prejudice. *Washington*, ¶ 20.

III. Conclusion

¶ 25 The order is affirmed.

JUDGE DAILEY and JUDGE ASHBY concur.