DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

JEFFREY T. LAMB,
Petitioner,

v.

WALTER A. MCNEIL, Secretary, Florida Department of Corrections,
Respondent.

No. 4D09-3508

[May 26, 2010]

WARNER, J.

Petitioner seeks habeas corpus relief alleging ineffective assistance of appellate counsel for failing to rely on a complete and accurate transcript of all of the proceedings of petitioner's first degree murder trial, as well as for failing to raise certain issues in direct appeal. We deny the writ.

To support his claim, petitioner points to several places where the trial transcripts of statements petitioner made to police included "inaudible" responses. Comparing the trial transcript to other transcripts created of the taped statements, he claims that because the trial transcript inaccurately recorded the taped statements, it misled appellate counsel in the selection of issues to raise on appeal. However, he has failed to show what meritorious issues were not raised as a result of the inaccurate transcript, which would have undermined confidence in the outcome of the proceedings. "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). The failure to transcribe the hearing on the motion for judgment of acquittal does not constitute ineffective assistance for the same reason. Petitioner has not shown that had the denial of the motion been raised in direct appeal, it would have undermined the correctness of the result, as there was competent substantial evidence to support the state's case. *See Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002).

Finally, petitioner maintains that appellate counsel should have raised the exclusion of defense evidence in the direct appeal. The trial court excluded the results of a test performed by an expert to show that a tire iron placed into evidence by the state could not be the murder weapon. The expert had conducted the test a day before being called to testify at petitioner's trial. The court excluded the evidence as a discovery violation. Defense counsel did not suggest or argue to the trial court for a less drastic remedy other than exclusion, nor did he suggest a way to cure the obvious prejudice to the state. However, the expert was otherwise permitted to give detailed testimony as to her opinion that the tire iron could not be the murder weapon, an opinion she had formed prior to conducting the test. Therefore, the evidence of the test was merely cumulative to her in-court testimony. We do not reach the question of whether the trial court erred in excluding the test results. Appellate counsel could rightfully have declined to raise this issue, because any error would have been harmless beyond a reasonable doubt. *See*, *e.g.*, *Wallace v. State*, 766 So. 2d 364, 372 (Fla. 3d DCA 2000) (finding error harmless because the excluded testimony was cumulative of other evidence presented to the jury); *Billeaud v. State*, 578 So. 2d 343, 344-45 (Fla. 1st DCA 1991) (error in excluding testimony tending to show that killing was a crime of passion was harmless beyond a reasonable doubt where the evidence was largely cumulative).

We reject all other claims made.

Petition denied.

GROSS, C.J., and TAYLOR, J., concur.

* * *

Petition alleging ineffective assistance of counsel to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lucy Chernow Brown, Judge; L.T. Case No. 2004 CF012283AXX.

Richard G. Lubin of Lubin and Metz, P.A., West Palm Beach, for petitioner.

Bill McCollum, Attorney General, Tallahassee, and Mark J. Hamel, Assistant Attorney General, West Palm Beach, for respondent State of Florida.

Not final until disposition of timely filed motion for rehearing.