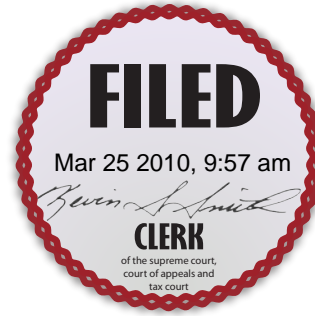


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD OLIVER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 71A05-0908-PC-445

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D03-0412-PC-38

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard Oliver was convicted of murder, and his conviction was affirmed. *Oliver v. State*, 755 N.E.2d 582 (Ind. 2001). Oliver petitioned for post-conviction relief, arguing counsel should have objected to part of the self-defense instruction given to the jury. In the alternative, Oliver argued that if the instruction was correct, trial counsel should have pursued a different trial strategy. The post-conviction court denied Oliver's petition, and we affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of December 26, 1997, David Weist went to Don Kime's apartment, where the two men drank and watched TV. Weist left to buy cigarettes. On the way, he encountered Oliver and invited him to come back to Kime's apartment with him. Oliver accepted, and the men continued to drink and watch TV. At some point, Weist gave Oliver \$10 to purchase cocaine. Thereafter, Weist, who had been drinking heavily, fell asleep.

Mark Makowski, who owned the apartment building and also lived there, arrived home with some friends after 3:00 a.m. Kime went to Makowski's apartment and asked to borrow a car to take Weist home. Makowski went to bed around 5:00 a.m., and he got up at 10:00 a.m. to get a drink. He saw Kime and a black male enter Kime's apartment. Makowski went back to bed, and he was awakened again around noon. His dog and Kime's dog were barking and would not stop. Makowski went to Kime's apartment to see what the problem was. After knocking several times, Makowski let himself in, and he saw Kime on the couch, looking bloody and "mangled." (R. at 480.) Kime was dead when paramedics and the police arrived.

Weist and Makowski could not identify the man they had seen at Kime's apartment or give his name, but a fingerprint led the police to investigate Oliver. Oliver first denied he knew Kime or had ever been to his apartment. After Oliver learned his fingerprint was found in the apartment, he made a second statement to the police in which he acknowledged he had met Weist on the street and had been invited into the apartment. He admitted Weist had given him money to buy cocaine, but he claimed he left no later than 1:00 a.m. and did not return.

In a third interview, Oliver claimed he returned to Kime's apartment around 1:00 or 2:00 a.m. and saw through the window that Kime had a knife stuck in his chest. He also claimed to see the back of a thin, white man with brown hair. After the police told Oliver they had evidence Kime had died around 10:00 a.m., Oliver admitted he had been in a scuffle with Kime because Kime was making unwanted sexual advances. Oliver described the struggle as follows: "So I had a knife in my back pocket, and I felt the knife on him and then he acted like he was trying to rush the knife or something. And I just stuck the knife out, and it hit him . . . in the chest somewhere." (*Id.* at 715.)

At Oliver's murder trial, the pathologist who performed the autopsy testified Kime bled to death. Kime had two superficial wounds; one on the neck and one near his collar bone. Toward the middle of his chest there was one fatal stab wound, which had penetrated Kime's sternum and aorta. The pathologist stated it would require "a lot of force to get that knife through . . . that chest bone." (*Id.* at 462.) The officer who responded to the 911 call, the evidence technician assigned to the case, and a detective all testified they saw no signs of

a struggle in Kime's apartment.

Oliver testified Weist had invited him into Kime's apartment and given him \$10 for cocaine. Oliver testified he purchased some cocaine, but smoked it all with a woman he had encountered on the street. After spending "half the night" with this woman, (*id.* at 771), he decided to return to Kime's apartment to tell Weist he had "messed up the money." (*Id.* at 772.) Oliver testified Kime opened the door and invited him in. They started talking, and Kime told him he was "a fine black man." (*Id.* at 773.) When Oliver learned Weist was no longer there, he said he was going to leave. However, Kime grabbed him and started "rubbing . . . up toward [Oliver's] penis." (*Id.* at 776.)

Oliver testified he tried to leave, but Kime pushed him down on the couch and got on top of him. When Kime started "messing with [Oliver's] zipper," Oliver pulled a knife out of his pocket and struck Kime on the neck. (*Id.* at 779.) Oliver testified that Kime then lifted up enough that he could push him away and move toward the door. Kime followed Oliver, and Oliver stuck out the knife and hit him in the chest. Oliver again moved toward the door, but Kime grabbed him. Oliver struck Kime with the knife a third time and felt the knife penetrate Kime's body. Kime stumbled back to the couch, and Oliver left the apartment.

The jury found Oliver guilty of murder and also found him to be an habitual offender. On December 9, 1999, the trial court sentenced him to an aggregate term of ninety-five years. Oliver's conviction was affirmed on appeal. *Oliver v. State*, 755 N.E.2d 582 (Ind. 2001).

Oliver filed a *pro se* petition for post-conviction relief. The State Public Defender entered an appearance and filed an amended petition. After a hearing, the court denied Oliver's petition.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied, cert. denied*. Oliver is appealing from a negative judgment, and to the extent his appeal turns on factual issues, he must convince us “that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court.” *Id.* We will reverse “only if the evidence is without conflict and leads only to a conclusion contrary to the result of the postconviction court.” *Id.*

To prevail on a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance so prejudiced the petitioner that he was denied a fair trial. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*). There is a strong presumption that counsel rendered adequate assistance. *Id.* “Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance.” *Id.* at 273. “Counsel's performance is evaluated as a whole.” *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish prejudice, Oliver must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Sims v. State, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable.” *Coleman*, 694 N.E.2d at 272.

1. Self-defense Instruction

The following self-defense instruction was given to the jury:

Where a defendant is accused of having taken the life of another human being, the killing is justified as self-defense only if all of the following four conditions exist:

1. The defendant acted without fault;
2. *The defendant was in a place where he had a right to be;*
3. The defendant acted to prevent the commission of a forcible felony against him; and
4. The force he used was reasonably necessary under all the circumstances.

When self-defense is raised, the State has the burden to disprove at least one of these four conditions beyond a reasonable doubt.

(R. at 96) (emphasis added).

Oliver argues trial counsel should have objected to the italicized portion of the instruction because that requirement is not found in the self-defense statute and is merely a relic of the common law. The common law rule of self-defense was:

One who is without fault, and in a place where he has a right to be, and is there unlawfully assailed, may, without retreating, repel force with force, and go even to the extent of taking the life of his adversary, if in repelling his assailant he used no more force than is reasonably necessary in his own self-defense.

Page v. State, 141 Ind. 236, 237, 40 N.E. 745, 745 (1895).

Although Ind. Code § 35-41-3-2 (1997) does not require the defendant to be in a place where he had a right to be, our Indiana Supreme Court has continued to recognize that the defendant must be in a place where he had the right to be. In *French v. State*, 273 Ind. 251, 254, 403 N.E.2d 821, 823 (1980), our Indiana Supreme Court set out a sample self-defense instruction that had been “repeatedly approved and is favored by this Court” and included the following language:

Whoever, being himself without fault and in a place where he has a right to be, so far as his assailant is concerned, is assaulted, he may, without retreating, repel force by force; and he need not believe that his safety requires him to kill his adversary in order to give him a right to make use of force for that purpose.

Id.

At the time of Oliver’s offense and his trial, appellate decisions required a defendant to be in a place where he had a right to be. *See, e.g., French*, 273 Ind. at 254, 403 N.E.2d at 823. At the post-conviction hearing, trial counsel testified he reviewed case law and determined that the instruction was correct as given. We cannot say counsel’s performance was deficient.

2. Trial Counsel’s Defense Strategy

Oliver argues that if the self-defense instruction was correct, trial counsel should not have pursued the defense of self-defense because the jury could have concluded he was not in a place he had a right to be. In *Bohan v. State*, 194 Ind. 227, 234, 141 N.E. 323, 326 (1923), our Indiana Supreme Court held, “The phrases ‘being without fault’ and ‘in a place where he had a right to be’ mean without fault in bringing on the combat, and having a legal

right to be at the place.” The testimony elicited from both parties at trial was consistent with Oliver being a guest in Kime’s apartment.

Oliver seizes on the phrase “legal right” in *Bohan* and argues a guest has no legal right to be in the host’s home. In support, he cites only *Colondro v. State*, 188 Ind. 533, 125 N.E. 27 (1919), which he characterizes as affirming a manslaughter conviction because the “defendant had no right to be on property belonging to a private steel company.” (Appellant’s Br. at 10.) In that case, a steel company employed a watchman to keep people from accessing certain property. The watchman attempted to stop Colondro, and a fight broke out. The watchman struck Colondro with a knife. After the watchman disengaged from the fight, Colondro stabbed him in the back and killed him. Colondro was convicted of manslaughter. On appeal, Colondro argued the self-defense instruction given at his trial was not sufficiently detailed. Our Indiana Supreme Court found the issue waived because Colondro had not tendered a more detailed instruction. *Colondro*, 188 Ind. at 535, 125 N.E. at 28. To the extent *Colondro* addresses a person’s right to be on the private property of another, the evidence indicated Colondro did not have permission to be there. Oliver cites no decision holding that, for purposes of establishing self-defense, a person has no legal right to be on the private property of another when permission has been granted.

Furthermore, the post-conviction court found Oliver’s status as a guest likely did not impact the jury’s verdict:

At trial, [Oliver] testified he was a guest in Mr. Kime’s home. Although landlord Mark Makowski provided a different description of [Oliver’s] means of entry to Kime’s apartment, the landlord also described [Oliver’s] presence as one of [a] guest. . . . Moreover, there was no evidence in the record (i.e., no

testimony from witnesses, no argument by counsel, no questions from jurors) to suggest [Oliver's] status was an issue.

* * * * *

An analysis of the evidence presented at trial reveals abundant reason for the jury to reject [Oliver's] testimony and find him guilty. [Oliver] offered multiple stories regarding his involvement, or lack thereof, in Mr. Kime's death. Petitioner appeared to mold his rendition of events to conform to a rolling disclosure of evidence involving fingerprints and pathology reports. . . .

Further, given the age of the victim,^[1] the multiple stab wounds to his body, the amount of force required to inflict the mortal wound, and the absence of signs of struggle in Mr. Kime's home, it is far more likely the jury found [Oliver's] testimony incredible.

(Appellant's App. at 113-14.) The evidence supports the trial court's finding there is no reasonable probability the issue of whether Oliver had a right to be in Kime's apartment affected the jury's verdict. *See Timberlake*, 753 N.E.2d at 597.

Finally, Oliver argues trial counsel should have argued he acted in sudden heat either instead of or in addition to raising self-defense. Trial counsel has wide latitude to choose "a strategy which, at the time and under the circumstances, he or she deems best." *Potter v. State*, 684 N.E.2d 1127, 1133 (Ind. 1997). As noted by the post-conviction court, Oliver's account of his confrontation with Kime most closely matched the defense of self-defense; therefore, we cannot say counsel's choice of defense strategies was "so deficient or unreasonable as to fall outside of the objective standard of reasonableness." *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

Because all of Oliver's arguments fail, we affirm the judgment of the post-conviction court.

¹ At the time of the offense, Kime was sixty-eight years old and Oliver was thirty-six.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.