FILED
02/18/2020
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0616

DA 18-0616

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 42N

WILLIAM PATRICK GIVEN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 16-1722
Honorable Mary Jane Knisely, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Attorney at Law, Billings, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

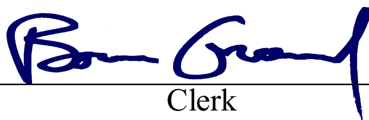
Scott Twito, Yellowstone County Attorney, Ann-Marie McKittrick, Deputy County Attorney, Billings, Montana

---

Submitted on Briefs: October 23, 2019

Decided: February 18, 2020

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Given appeals from the order denying post-conviction relief entered in the Thirteenth Judicial District Court, Yellowstone County, by the Honorable Mary Jane Knisely. Given raises multiple issues, which we have reorganized and will address in turn. We affirm.

¶3 This matter previously came before the Court on direct appeal. Our decision in *State v. Given*, 2015 MT 273, 381 Mont. 115, 359 P.3d 90, carefully summarized the background facts underlying this case. Here, we incorporate those facts and discuss additional facts necessary for the post-conviction proceeding.

¶4 On January 3, 2013, Given was found guilty of sexual assault of a minor. Given also pled nolo contendere to failure to register as a sex offender. Given's total sentence was 70 years at the Montana State Prison with 20 years suspended. His convictions stem from multiple incidents in which he molested K.F.: at K.F.'s home, at Given's home, and while the two were on a camping trip.

¶5 On December 14, 2016, Given filed a petition for post-conviction relief (Petition). The District Court issued a *Gilham* order so that Given's trial and appellate counsel,

Jack Sands, could respond to his allegations. The District Court considered an affidavit from Sands and a response from the State. On September 8, 2018, the District Court issued a comprehensive and thorough 39-page order denying Given's Petition.

¶6 The standard of review of a district court's denial of a petition for post-conviction relief is whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *State v. Charlo*, 2000 MT 192, ¶ 7, 300 Mont. 435, 4 P.3d 1201. Rulings related to whether to hold an evidentiary hearing are reviewed for an abuse of discretion. *Watson v. State*, 2002 MT 329, ¶ 6, 313 Mont. 209, 61 P.3d 759.

¶7 When considering ineffective assistance of counsel claims in post-conviction proceedings, this Court has adopted the two-pronged test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). First, counsel's performance must be deficient. This requires showing counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. This test also applies to petitions for post-conviction relief. *State v. Wright*, 2001 MT 282, ¶ 11, 307 Mont. 349, 42 P.3d 753 (citation omitted).

¶8 Moreover, a petition requesting post-conviction relief must show, by a preponderance of the evidence, that the facts justify the relief. *Hamilton v. State*,

2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588 (citation omitted). A petition for post-conviction relief must, "identify all facts supporting the [asserted] grounds for relief . . . and have attached affidavits, records, or other evidence establishing the existence of those facts." Section 46-21-104(1)(c), MCA. "Mere conclusory allegations are insufficient to support the petition." *Hamilton*, ¶ 10 (citation omitted). The district court may deny a petition on the pleadings for failure to state a claim when the petition and supporting memorandum and evidentiary showing fail to present a prima facie post-conviction claim. Section 46-21-201(1)(a), MCA; *Herman v. State*, 2006 MT 7, ¶ 15, 330 Mont. 267, 127 P.3d 422.

¶9 Preliminarily, we note that many of Given's claims were not raised in the District Court. An appellate court does not address issues raised for the first time on appeal. *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142. Further, "[w]e do not consider unsupported arguments; nor do we have an obligation to formulate arguments or locate authorities for parties on appeal." *Herman*, ¶ 22. Accordingly, this Court will address only those claims substantively argued on appeal which were also submitted to the District Court.

A. Layout of the Camper.

¶10 Given claims counsel should have investigated the layout of his camper because the divider between the two areas of the trailer was light-weight material, rather than an actual door. He argues the significance of the divider because, "if defense counsel had investigated the layout and configuration of the camper, he could have shown the jury the

door was not sound proof, and if any, untoward acts occurred, it is likely [K.F.'s sister] . . . would have heard them." The District Court noted that K.F., during trial, described the divider as a curtain, and never alleged Given, or he, made any noise. The District Court denied this claim, explaining that Given did not demonstrate how this evidence would have assisted in any meaningful way. The District Court noted that, "at no time did any witness suggest that Given and K.F. were in a sound-proof room in this small camper." Although Given claims that counsel failed to investigate the layout of the camper, he fails to show how an investigation of the camper would have been beneficial to his defense. Accordingly, Given fails to demonstrate how counsel's performance was constitutionally deficient or prejudiced his defense. The District Court did not err in denying his claim.

B. Alibi Defense.

¶11 Given claims that counsel should have pursued an alibi defense because Given traveled for work and was away during the harvest season. In Sands's affidavit, Sands explained that he was unable to establish, "an iron-clad alibi defense" because "the victim never specified a time when the incident occurred, and Mr. Given had returned to Montana from time to time during the period in question." The District Court denied Given's alibi defense claim noting, "an alibi defense is for a person who claims that he was somewhere else and therefore could not have committed the crime." The District Court noted that Given himself testified he was with K.F. during the multiple incidents to which K.F. testified. We agree that failure to pursue an alibi defense was not

ineffective assistance of counsel. Given acknowledged he was alone with K.F. but argued that the events did not unfold as K.F. described. The District Court did not err in denying Given's claim respecting an alibi defense.

C. Dr. Wendy Dutton.

¶12 Given raised numerous claims about Dr. Wendy Dutton's testimony. Initially, it is important to note this Court has long recognized the substance of Dr. Dutton's testimony as admissible under Mont. R. Evid. 702. *Given*, ¶ 46 n.2 (citing *State v. Robins*, 2013 MT 71, ¶ 16, 369 Mont. 291, 297 P.3d 1213; *State v. Morgan*, 1998 MT 268, ¶ 29, 291 Mont. 347, 968 P.2d 1120).

¶13 Given first claims Sands failed to question Dr. Dutton under the three factors in *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991). In *Scheffelman*, this Court held that an expert witness can comment directly on a victim's credibility if the child's credibility is attacked and the expert has the following qualifications: (1) extensive firsthand experience with sexually abused and non-sexually abused children; (2) thorough and up to date knowledge of the professional literature on child sexual abuse; and (3) objectivity and neutrality about individual cases as are required of other experts. 250 Mont. at 342, 820 P.2d at 1298. However, *Scheffelman* does not apply to Dr. Dutton's testimony because Dr. Dutton did not testify about K.F.'s credibility after reviewing the particular facts of the case. This Court observed in *Robins*, "the fact that [the expert's] testimony was consistent with the victim's allegations does

not mean that [the expert] vouched for the victim or commented on her credibility." *Robins*, ¶ 14.

¶14 Next, Given contends Sands failed to object that Dutton's testimony exceeded the scope of the State's disclosure. Under § 46-15-322(1)(a) and (c), MCA, a prosecutor must provide the names, addresses, and statements of witnesses and all written reports or statements of experts who have examined the defendant or any evidence in the case. A "prosecutor may not be required to prepare or disclose summaries of witnesses' testimony." Section 46-15-322(5), MCA. Given fails to demonstrate that he had a meritorious objection to the State's disclosure. Indeed, this Court specifically held that the State complied with the disclosure statutes. *Given*, ¶ 49.

¶15 Next, Given claims counsel was ineffective for failing to interview Dr. Dutton. The District Court found, "Given provided no affidavit or other evidence that under the specific facts of this case, an interview of Dr. Dutton was required to be effective." The District Court denied Given's claim because Given failed to establish, "what could be gained in an interview that his attorney did not already know." This Court agrees.

¶16 Finally, Given claims counsel was ineffective for failing to retain its own expert on child sexual abuse. However, whether to hire an expert witness or, instead, to undermine Dr. Dutton's testimony through a review of her dissertation and cross-examination is a strategic decision. *Hamilton*, ¶ 19. Here, the District Court found that defense counsel made a strategic decision not to hire an expert.

¶17 Having reviewed the record, we conclude the District Court did not err in denying Given's claims regarding Dr. Dutton's testimony.

D. Testimony of K.F.'s Sister.

¶18 Given claims counsel was ineffective for failing to object to K.F.'s sister's testimony where K.F. testified to having been abused by Given. However, this Court affirmed the admission of her testimony in *Given*, ¶ 34. Counsel also raised a continuing objection during the sister's testimony and the court noted that his objection was, "continuing for the record." As this Court found there was no error in admitting the testimony, Given cannot meet his burden of demonstrating deficiency or prejudice.

E. Closing Argument.

¶19 Given claims that counsel was ineffective for failing to object during closing argument when the prosecutor stated, "[y]ou have just seen a child molester in action," and when the prosecutor asked the jury to tell K.F. they believe him and give K.F. justice. This Court has recognized, "because many lawyers refrain from objecting during . . . closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the 'wide range' of permissible professional legal conduct." *Kills on Top v. State*, 273 Mont. 32, 51, 901 P.2d 1368, 1380 (1995) (citation omitted). This Court has further recognized that counsel may choose not to object for strategic reasons; thus, "failure to object does not qualify as unreasonable conduct by trial counsel." *State v. Lacey*, 2012 MT 52, ¶ 28, 364 Mont. 291, 272 P.3d 1288. A defendant must prove, "but for counsel's errors, a reasonable

probability exists that the result of the proceeding would have been different." *Stock v. State*, 2014 MT 46, ¶ 24, 374 Mont. 80, 318 P.3d 1053 (citation omitted). The District Court held, "assuming that the failure to object to the prosecutor's statement was deficient, Given has failed to prove but for the objection the result would have been different." This Court agrees. Given fails to demonstrate how an objection to the prosecutor's comments, which the jury was informed were not evidence, would have resulted in a different outcome.

F. Sexual Device.

¶20 Given claimed, "defense counsel did not object to the display [of a sexual device] to the jury, nor did he move for a mistrial." To begin, the record demonstrates, and the District Court found, that Given's attorney did move to exclude the sexual device. The District Court heard oral arguments in chambers and ruled the sexual device was admissible. Sands further objected during the trial to its admission. Given contends Sands should have moved for a mistrial. However, admitting the sexual device was not error because it corroborated K.F.'s testimony wherein Given demonstrated how it was to be used and that K.F. should use it in the future. Given fails to meet his burden of demonstrating that counsel's failure to move for a mistrial was deficient or to demonstrate a reasonable probability that the district court would have granted a mistrial.

G. Dr. Michael Sullivan and Investigation of Given's Mother, K.F.'s Siblings, Brandi Bixby, and Other Unnamed Potential Witnesses.

¶21 Given contends that counsel was ineffective for failing to limit or exclude the testimony of the State's other expert witness, Dr. Michael Sullivan, and failing to

interview Given's mother, K.F.'s siblings, Brandi Bixby, and other unnamed witnesses. The District Court determined Given's claim concerning Dr. Sullivan did not meet the pleading requirements of § 46-21-104(2), MCA, and that the claims were not supported with legal analysis. This Court agrees. By failing to include a legal analysis, Given also fails to demonstrate how counsel was deficient or that he was prejudiced by counsel's failure to object to Dr. Sullivan's testimony. The same is true of witnesses Given claims were not interviewed and Given's complaint that Sands's investigation was inadequate. The District Court found, "Given provides no evidence to support his argument" and that "Given merely speculates about how these witnesses might have testified." Although Given asserts these witnesses would have offered character evidence casting him in a more favorable light, he provides no legal analysis or anything to otherwise establish that such character testimony would have been admissible. The District Court recognized the lack of legal analysis and found it problematic. We similarly conclude that Given has not provided a basis upon which this Court could conclude that defense counsel's performance was deficient or that Given was prejudiced by the error.

H. Appeal.

¶22 Given claims, on appeal, Sands failed to litigate all of the issues respecting the highly prejudicial expert testimony of Dr. Dutton and to contest the admission of the sexual device. To demonstrate that counsel's failure to raise a claim on appeal constituted ineffective assistance of appellate counsel, a petitioner must demonstrate that the failure to raise the claim fell below an objective standard of reasonableness and a

reasonable probability that, but for counsel's failure to raise the claim, the petitioner would have prevailed on appeal. *Dawson v. State*, 2000 MT 219, ¶ 147, 301 Mont. 135, 10 P.3d 49. Appellate counsel, "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 766 (2000). "The presumption of effective assistance of counsel will be overcome only when ignored issues are clearly stronger than those presented." *Miller v. State*, 2012 MT 131, ¶ 31, 365 Mont. 264, 280 P.3d 272. This Court held in Given's appeal that Dr. Dutton's testimony has long been recognized as admissible. *Given*, ¶ 46 n.2. Additionally, there was no error in admitting the sexual device because it corroborated K.F.'s testimony.

¶23 We conclude that Given's petition for post-conviction relief fails to demonstrate a prima facie case of ineffective assistance of counsel and fails to satisfy the procedural threshold set forth in § 46-21-104(1)(c), MCA. It is apparent the District Court thoroughly reviewed each claim and correctly determined that Given failed to establish any of his claims. The District Court did not abuse its discretion when it dismissed Given's petition without first conducting an evidentiary hearing. *Watson*, ¶ 6.

¶24 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶25 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ JIM RICE
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON