

FILED: July 10, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ERNEST N. LOTCHES,
Petitioner-Appellant,

v.

JEFF PREMO,
Superintendent,
Oregon State Penitentiary,
Defendant-Respondent.

Marion County Circuit Court
01C18545

A145569

Joseph C. Guimond, Judge.

Argued and submitted on February 05, 2013.

Bronson D. James argued the cause for appellant. With him on the brief was JDL Attorneys, LLP.

Kathleen Cegla, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

EGAN, J.

Affirmed.

1 EGAN, J.

2 Petitioner appeals a judgment denying his petition for post-conviction
3 relief. We affirm.

4 Petitioner alleged that he was denied adequate assistance of trial counsel
5 under Article I, section 11, of the Oregon Constitution.¹ At his initial trial, a jury
6 convicted petitioner of three counts of aggravated murder, one count of attempted
7 aggravated murder, one count of attempted murder, one count of assault in the first
8 degree with a firearm, one count of robbery in the first degree, and one count of felon in
9 possession of a firearm, and imposed a sentence of death on the aggravated murder
10 counts. Petitioner alleges that trial counsel failed to investigate and present a "culturally
11 attuned" defense emphasizing self-defense and post-traumatic stress disorder, failed to
12 investigate petitioner's mental health history in order to buttress these defenses, and
13 interfered with petitioner's right to testify, noting that the record does not establish that
14 trial counsel informed petitioner of his right to testify. Petitioner asserts that those
15 failures amounted to constitutionally inadequate assistance of counsel.²

¹ "In all criminal prosecutions, the accused shall have the right to * * * be heard by himself and counsel[.]" Or Const, Art I, § 11. The federal and state constitutional standards are similar, *Montez v. Czerniak*, 237 Or App 276, 283, 239 P3d 1023 (2010), *rev allowed*, 351 Or 321 (2011), and petitioner failed to offer a separate argument under the Sixth Amendment to the United States Constitution. Consequently, we do not separately address his federal claim. *See Koch v. State of Oregon*, 252 Or App 657, 658 n 1, 288 P3d 582 (2012) (explaining that we do not develop a party's argument if the party has not endeavored to do so).

² Petitioner's appellate counsel has repeatedly made clear, most recently at oral argument, that in accordance with petitioner's directions, no arguments challenging the

1 We summarize the facts from the post-conviction court's findings and from
2 the record. We are bound by a post-conviction court's findings of fact if they are
3 supported by evidence in the record,³ and we review its legal conclusions for errors of
4 law. *Derschon v. Belleque*, 252 Or App 465, 466, 287 P3d 1189 (2012), *rev den*, 353 Or
5 208 (2013).

6 The convictions at issue in this case resulted from an altercation in
7 Portland, Oregon, on August 22, 1992. *State v. Lotches*, 331 Or 455, 457, 17 P3d 1045
8 (2000). A string of confrontations culminated when petitioner fired a handgun at several
9 unarmed people and one armed security officer. *Id.* at 458-59. After petitioner's attempts
10 at flight failed, he surrendered to the police. *Id.* at 460. There was evidence that
11 petitioner was intoxicated at the time. *Id.* at 461. Petitioner pleaded not guilty to all
12 charges in a 10-count indictment. *Id.*

13 The trial court appointed two experienced attorneys to represent petitioner.
14 Those attorneys, and their investigators, met with petitioner repeatedly. During the entire
15 period of preparation and the trial itself, petitioner maintained that he remembered
16 nothing beyond the initial confrontation. Those denials included his testimony at the
17 penalty phase that he could remember nothing about the shooting and that all he
18 remembered about that day was that he had been drinking.

19 The jury trial focused on petitioner's mental state as trial counsel pursued a

results of the penalty phase have been offered.

³ Petitioner does not challenge any of the factual findings of the post-conviction court.

1 defense of "guilty but insane." Petitioner was convicted of three counts of aggravated
2 murder, one count of attempted aggravated murder, one count of attempted murder, one
3 count of assault in the first degree with a firearm, one count of robbery in the first degree,
4 and one count of felon in possession of a firearm. *Id.* at 457. The jury acquitted
5 petitioner on one count of attempted murder. *Id.* at 461. After a penalty-phase
6 proceeding, petitioner was sentenced to death. *Id.*

7 On direct and automatic review, the Oregon Supreme Court reversed two of
8 the convictions for aggravated murder, but affirmed the remaining convictions, including
9 one count of aggravated murder, and affirmed the death sentence. *Id.* at 457. Petitioner
10 sought post-conviction relief and, on June 23, 2009, the post-conviction court conducted
11 a hearing on petitioner's Ninth Amended Petition for Post-Conviction Relief.

12 Petitioner is a member of the Native American Klamath-Modoc tribe and
13 the hearing included extensive testimony about the history of the Klamath-Modoc people
14 and various egregious acts of misconduct perpetrated against them by, *inter alia*, the
15 United States government. There was also extensive evidence as to petitioner's own
16 dysfunctional family and traumatic experiences and some evidence as to the extent that
17 those experiences might have affected petitioner. The post-conviction court concluded
18 that the evidence failed to establish inadequate performance by counsel and that, even
19 assuming constitutionally inadequate performance, there had been no showing of
20 prejudice. The post-conviction court denied all relief, and petitioner now appeals.

21 "The burden is on petitioner to show, by a preponderance of the evidence,

1 facts demonstrating that trial counsel failed to exercise reasonable professional skill and
2 judgment and that petitioner suffered prejudice as a result." *Trujillo v. Maass*, 312 Or
3 431, 435, 822 P2d 703 (1991) (citing ORS 138.620(2)). In order to satisfy that standard
4 under Article I, section 11, a petitioner must demonstrate that the failure to exercise
5 reasonable professional skill and judgment had a tendency to affect the result of the trial.
6 *Stevens v. State of Oregon*, 322 Or 101, 110, 902 P2d 1137 (1995).⁴ It is the task of the
7 post-conviction court to reconstruct trial counsel's challenged conduct in light of the
8 circumstances presented at the time of the alleged error with an eye toward elimination of
9 the distorting effects of hindsight. *Montez*, 237 Or App at 283 (citing *Strickland v.*
10 *Washington*, 466 US 668, 689, 104 S Ct 2052, 80 L Ed 2d 674 (1984)). In reviewing a
11 claim of constitutionally inadequate assistance of counsel, the post-conviction court "will
12 not second-guess a lawyer's tactical decisions unless those decisions reflect an absence or
13 suspension of professional skill and judgment[.]" *Cunningham v. Thompson*, 186 Or App
14 221, 226, 62 P3d 823 (2003), *rev den*, 337 Or 327 (2004). In summary, a post-conviction
15 court must view a claim of constitutionally inadequate assistance of counsel in a manner
16 highly deferential to the trial attorney. *Hayward v. Belleque*, 248 Or App 141, 148, 273

⁴ As to prejudice, petitioner cites several federal cases for the proposition that, under the Sixth Amendment, a court may not need to analyze the individual prejudicial effects of each deficiency in trial counsel's performance when "cumulative prejudice" from those deficiencies supports a conclusion of ineffective assistance. Petitioner acknowledges that no Oregon court has applied a cumulative error analysis, but he urges us to adopt a similar approach under Article I, section 11. Because, as explained below, we conclude that the post-conviction court correctly concluded that petitioner had failed to prove that his trial counsel was deficient in any of the alleged respects, we need not reach petitioner's "cumulative prejudice" argument.

1 P3d 926 (2012), *rev den*, 353 Or 208 (2013) (citing *Kimmelman v. Morrison*, 477 US
2 365, 381, 106 S Ct 2574, 91 L Ed 2d 305 (1986)).

3 There is no single, succinct, clearly defined standard for determining
4 adequacy of counsel. *Stevens*, 322 Or at 108. The Oregon Constitution does not give a
5 criminal defendant the right to a perfect defense, but requires only that the lawyer do
6 those things reasonably necessary to diligently and conscientiously advance the defense.
7 *Id.* The exercise of reasonable professional skill and judgment generally requires an
8 investigation that is "legally and factually appropriate to the nature and complexity of the
9 case so that the lawyer is equipped to advise and represent the client in an informed
10 manner." *Id.* The post-conviction court must therefore consider and determine whether
11 petitioner's trial counsel's investigation was "legally and factually appropriate to the
12 nature and complexity of the case so that the lawyer is equipped to advise and represent
13 [petitioner] in an informed manner." *Id.* Post-conviction relief is a statutory civil cause
14 of action where petitioner bears the burden of proof and, having failed before the post-
15 conviction court, must now persuade this court that the unchallenged factual findings
16 indisputably lead to different legal conclusions from those reached by the post-conviction
17 court. In other words, given petitioner's acceptance of the post-conviction court's
18 findings, he can prevail on appeal only if those findings necessitate the granting of one or
19 more of his legal claims.

20 As noted, petitioner alleged that he was denied adequate assistance of
21 counsel under Article I, section 11, based on, *inter alia*, counsel's alleged failure to

1 investigate his cultural background and offer a defense based upon the unique factors in
2 petitioner's history, particularly the experiences he suffered as a member of the Klamath-
3 Modoc tribe.

4 Petitioner's argument fails because it is not merely inconsistent with the
5 evidence, but contradicted by the post-conviction court's findings. Specifically, the post-
6 conviction court found that, even if petitioner's trial attorneys had considered a "culturally
7 attuned" defense, they would have rejected such an approach because it would have been
8 inconsistent with the other evidence and inconsistent with establishing credibility with
9 the jury. For example, that defense was inconsistent with the petitioner's own deposition
10 testimony regarding his reactions. In his deposition, petitioner claimed that his reaction
11 that resulted in the murder was a function of the years that he had spent in prison. He
12 presented no evidence to show that he had told his attorneys about any connection
13 between his conduct on August 22, 1992, and his Native American heritage. Nor did he
14 present any evidence that his attorneys knew, or should have known, in the exercise of
15 reasonable professional performance that the plight of the Klamath-Modoc tribe had any
16 significant relationship to the conduct for which petitioner was tried and convicted. Trial
17 counsel's investigation was "legally and factually appropriate" to this case. *Stevens*, 322
18 Or at 108. There exists, therefore, no legal error.

19 Petitioner next claims that his trial attorneys failed to investigate his mental
20 health history in order to better buttress the defense case. Petitioner argues that it was
21 insufficient for trial counsel to investigate his mental health as they had in order to

1 prepare his insanity defense. He now argues that trial counsel were required to relate the
2 results of the mental health history investigation to his Klamath-Modoc heritage.

3 The claim that petitioner's trial attorneys failed to adequately investigate his
4 mental health history is clearly contradicted by the record. Petitioner's trial attorneys
5 reviewed thousands of pages of petitioner's criminal and mental health history. Petitioner
6 had had success utilizing the insanity defense in earlier criminal cases, and his trial
7 attorneys reasonably concluded, after investigation and consultation with experts, that
8 such a defense was worth presenting. The post-conviction court found that "[p]etitioner
9 wanted his counsel to present an insanity defense, and he was heavily invested in that
10 defense." In a case with such an extended string of criminal acts and extensive evidence,
11 any approach is fraught with risk and we will not second-guess the strategic choices of
12 petitioner's trial attorneys. As we stated earlier, petitioner explained in his deposition that
13 his reaction that resulted in the murder was a function of the years that he had spent in
14 prison, rather than his experience as a Native American or related family problems. Once
15 again, trial counsel's investigation was legally and factually appropriate to this case and
16 there exists no legal error.

17 Petitioner finally argues that the record does not disclose whether trial
18 counsel explicitly informed petitioner of his right to testify at trial. This mercurial claim
19 made a metamorphosis from "[p]etitioner's trial counsel interfered with his right to testify
20 at trial" to "the record does not disclose that defendant's counsel informed defendant that
21 he had the right to testify." However petitioner characterizes the claimed error, the post-

1 conviction court's factual findings fully dispose of the issue. The post-conviction court
2 specifically found that "petitioner knew he could testify and had decided not to testify
3 before the defense closed its case-in-chief." The post-conviction court added, "In any
4 event, petitioner presented no persuasive evidence to prove that he still wanted to testify
5 when the defense closed its case-in-chief."

6 On direct appeal, the Supreme Court determined that the petitioner had
7 "waived his right to testify a second time at the conclusion of the trial." *Lotches*, 331 Or
8 at 485. Petitioner does not assert, nor is there any evidence, that trial counsel subverted
9 his right to testify. Petitioner bore the burden of proof in the post-conviction case and
10 simply failed to offer any evidence to support the claimed misconduct or the claimed
11 error. The post-conviction court found that petitioner decided not to testify, and
12 petitioner has not challenged that finding.

13 The post-conviction court correctly concluded that petitioner received
14 constitutionally adequate representation.

15 Affirmed.