

IN THE UTAH COURT OF APPEALS

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| Andrew G. Fedorowicz,     | ) | MEMORANDUM DECISION   |
|                           | ) | (Not For Official Publication)  |
| Petitioner and Appellant, | ) |   |
|                           | ) | Case No. 20040725-CA  |
| v.                        | ) |   |
|                           | ) | F I L E D   |
| State of Utah,            | ) | (September 22, 2005)  |
|                           | ) |   |
| Respondent and Appellee.  | ) | <span style="border: 1px solid black; padding: 2px;">2005 UT App 405</span> |

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Third District, Salt Lake Department, 030926429  
The Honorable J. Dennis Frederick

Attorneys: Andrew G. Fedorowicz, Hurricane, Appellant Pro Se  
Mark L. Shurtleff, Karen C. Klucznik, and Brett J.  
DelPorto, Salt Lake City, for Appellee

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Before Judges Billings, McHugh, and Orme.

PER CURIAM:

Andrew Fedorowicz appeals from an order denying a petition for post-conviction relief.

We review the denial of a petition for post-conviction relief "for correctness without deference to the lower court's conclusions of law." Gardner v. Galetka, 2004 UT 42, ¶7, 94 P.3d 263. The district court's findings of fact will be disturbed "only if they are clearly erroneous." Matthews v. Galetka, 958 P.2d 949, 950 (Utah Ct. App. 1998). After reviewing the record, "we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted." Id.

The district court correctly concluded that Fedorowicz's claims that (1) the medical examiner was biased or gave perjured testimony, (2) the prosecution failed to turn over potentially exculpatory documents,<sup>1</sup> and (3) he was denied various

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<sup>1</sup>Although ruling that this claim was procedurally barred, the district court also addressed the merits of the claim and concluded that Fedorowicz has not demonstrated that the State  
(continued...)

"international" and constitutional rights were all barred because they could have been raised on direct appeal, but they were not. See Utah Code Ann. § 78-35a-106(c) (2002) ("A person is not eligible for relief . . . upon any ground that . . . could have been but was not raised at trial or on appeal."). Fedorowicz could raise his claims of ineffective assistance of counsel in the post-conviction petition because he had been represented by the same counsel at trial and on direct appeal. See State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991) (stating an ineffectiveness claim may be raised on direct appeal only if defendant is not represented by the same counsel on appeal as at trial). We therefore now consider the district court's ruling on the merits of the ineffectiveness of counsel claims.

On direct appeal, Fedorowicz conceded that "[t]he State introduced overwhelming expert testimony that . . . supports the conclusion that Rebecca sustained serious, nonaccidental physical injuries and died from those injuries, leaving open only the question of the identity of the perpetrator." State v. Fedorowicz, 2002 UT 67, ¶43, 52 P.3d 1194. After noting "that the evidence connecting Fedorowicz to Rebecca's fatal injuries is largely, if not completely, circumstantial," the supreme court stated that it would affirm the convictions "so long as the circumstantial evidence connecting him to the crimes charged is sufficient." Id. at ¶41. The supreme court held that the State had "presented sufficient evidence for the jury to reasonably conclude that Fedorowicz was responsible for Rebecca's injuries and death." Id. at ¶42. In addition, the court further held that the State "proffered sufficient evidence to show that Fedorowicz had the 'care or custody' of Rebecca and intentionally or knowingly 'permitted another to inflict serious physical injury.'" Id. at ¶44 (quoting Utah Code Ann. § 76-5-109(2)(a)). "From this evidence the jury could have either reasonably concluded that Fedorowicz either inflicted Rebecca's fatal injuries or that he permitted another to inflict those injuries while Rebecca was in his care or custody." Id. at ¶45.

Because Fedorowicz was represented by the same counsel at trial and on direct appeal, he could assert the ineffectiveness claims in a petition for post-conviction relief. See Humphries, 818 P.2d at 1029. Fedorowicz contends that trial and appellate counsel rendered ineffective assistance by conceding that Rebecca suffered nonaccidental trauma that resulted in her death. In a

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<sup>1</sup>(...continued)  
withheld the documents, that they were favorable, or that he was prejudiced by not receiving these materials. Because we agree that Fedorowicz was precluded from raising this claim in post-conviction proceedings, we do not review its merits.

related claim, he contends that counsel was ineffective in failing to retain and call an expert witness to dispute the cause of the child's death and challenge the testimony of the State's medical witnesses.

To succeed on an ineffective assistance of counsel claim, a petitioner must show that counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment" and "counsel's deficient performance prejudiced him." State v. Roth, 2001 UT 103, ¶5, 37 P.3d 1099 (citations and quotations omitted). To demonstrate prejudice, a petitioner must show "that there exists a reasonable probability that absent the deficient conduct, [he] would have obtained a more favorable outcome at trial." State v. Crosby, 927 P.2d 638, 644 (Utah 1996). "In addition, we give trial counsel wide latitude in making tactical decisions." Id. "It is well established that trial tactics and strategies including what witnesses to call [and] what defenses to put forth are within the prerogative of counsel and are generally left to counsel's professional judgment." State v. Tyler, 850 P.2d 1250, 1256 (Utah 1993). Accordingly, to establish deficient performance, a petitioner must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." State v. Litherland, 2000 UT 76, ¶19, 12 P.3d 92. Applying these standards in this case, the district court correctly concluded that Fedorowicz's counsel made a reasonable tactical decision to concede that death resulted from nonaccidental injuries, then to challenge the circumstantial evidence relied upon by the State to link Fedorowicz to the injuries.

Fedorowicz also claims that trial counsel was ineffective in failing to obtain a medical expert "to point out conflicting stories with[in] the doctors['] testimonies and to present competing reasons for bruising, for example, blood disorder." First, Fedorowicz does not demonstrate that any such witness existed. Although he presented correspondence from two doctors who were willing to look at the case, he did not demonstrate that either would have been available to testify after assessing the facts or that either had any degree of familiarity with the facts. The claim that counsel was deficient in failing to procure a medical expert is wholly speculative. Tyler, 850 P.2d at 1254 ("[P]roof of counsel's ineffectiveness must be a demonstrable reality, not mere speculation."). The district court further concluded that the decision not to call a defense expert was a reasonable tactical decision given the State's compelling medical evidence because independent evaluation could have produced results consistent with the findings of the State's experts. In addition, the State had presented evidence effectively negating the existence of a blood disorder as the cause of death. "[C]ounsel's decision to call or not to call an

expert witness is a matter of trial strategy, which will not be questioned unless there is no reasonable basis for that decision." Id. at 1256. The district court correctly concluded that the decision not to call an expert to dispute the cause of death was a legitimate trial strategy and did not constitute deficient performance by trial and appellate counsel.

Because there was a reasonable basis to support the district court's ruling, we affirm the denial of the petition for post-conviction relief.

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Judith M. Billings,  
Presiding Judge

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Carolyn B. McHugh, Judge

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Gregory K. Orme, Judge