

SUPREME COURT OF ARKANSAS

No. CR11-11

BILLY JOE KELLEY, JR.,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered December 1, 2011APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, FIFTH
DIVISIONNO. CR-07-1169,
HON. ERNEST SANDERS, JR.,
JUDGE,AFFIRMED.**KAREN R. BAKER, Associate Justice**

Appellant Billy Joe Kelley, Jr., appeals a decision of the Pulaski County Circuit Court denying his petition for postconviction relief under Rule 37.1 of the Arkansas Rules of Criminal Procedure. Kelley argues that the circuit court erred in denying his petition, which asserted that his trial attorney was ineffective for not preserving a Confrontation Clause challenge for appellate review. Kelley was convicted of rape and sentenced to life imprisonment as a habitual offender. This court affirmed on direct appeal, and the relevant facts are set forth in that opinion. *See Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009). On direct appeal, this court determined that the confrontation issue was not preserved for review because Kelley failed to obtain a ruling on the objection from the circuit court. *Id.* Kelley filed a timely petition for postconviction relief under Rule 37.1. Kelley moved to amend his petition, based on *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527

(2009), and the circuit court granted his motion to amend. After an evidentiary hearing, the circuit court denied Kelley's petition. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2011). We affirm the circuit court's denial of Kelley's petition for postconviction relief.

On appeal, Kelley asserts that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. Kelley asserts that trial counsel was ineffective for failing to obtain a ruling on his Confrontation Clause objection to evidence that the victim tested positive for chlamydia because the State did not produce the laboratory technician who performed the test. On direct appeal, we declined to consider Kelley's argument because his trial counsel failed to obtain a ruling on this basis, stating that the "failure to obtain a ruling on an issue at the trial court level, including a constitutional one, precludes review on appeal." *Kelley*, 375 Ark. at 488, 292 S.W.3d at 300. Kelley asserted in his amended petition for postconviction relief that the Supreme Court held in *Melendez-Diaz* that "the Sixth Amendment does not permit the prosecution to prove his case via *ex parte* out-of-court affidavits." Kelley argued that his right to cross-examine the lab technician who performed the chlamydia test was identical to the right of the defendant in *Melendez-Diaz* who was deprived of his Sixth Amendment right to confront the tech who performed tests on a substance identified as cocaine when the State introduced the test results through "certificates of analysis."

The right to counsel, guaranteed by the Sixth Amendment to the United States Constitution, is "the right to effective assistance of counsel." *Lee v. State*, 2009 Ark. 255, at

3, 308 S.W.3d 596, 600 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). The question in determining whether an attorney rendered constitutionally ineffective assistance of counsel is “whether the counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* To prove a claim of ineffective assistance of counsel, a petitioner must show (1) that “counsel’s representation fell below an objective standard of reasonableness,” and (2) that counsel’s particular errors “actually had an effect on the defense.” *Id.* (quoting *Strickland*, 466 U.S. at 693).

There is a strong presumption that the trial counsel’s representation falls within the wide range of reasonable professional assistance. *Id.* To overcome the presumption, the petitioner must identify specific acts and omissions that, when viewed from counsel’s perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.* According to the second prong of the *Strickland* test, even if counsel’s conduct is shown to be professionally unreasonable, the judgment will stand unless the petitioner can demonstrate that the error had an actual prejudicial effect on the outcome of the proceeding. *Id.* (citing *Strickland*, 466 U.S. at 691). The petitioner must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 4, 308 S.W.3d at 601 (quoting *Strickland*, 466 U.S. at 694). To prevail under *Strickland*, a claim of ineffective assistance of counsel must satisfy both prongs of the *Strickland* test. *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587.

We need not consider the first prong of the *Strickland* test if we determine that counsel's alleged deficiency did not prejudice the defendant. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. We heed this advice and examine whether Kelley satisfied the prejudice prong under *Strickland*.

This court will not reverse a circuit court's denial of postconviction relief unless the decision is clearly erroneous or clearly against the preponderance of the evidence. *Lee v. State*, 2009 Ark. at 4, 308 S.W.3d at 601. A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing all of the evidence, is left with the definite and firm conviction that a mistake has been made. *Id.*

After an evidentiary hearing, the circuit court correctly identified the *Strickland* test and concluded that Kelley failed to provide any evidence that he was prejudiced by his trial counsel's failure to obtain a ruling on the Confrontation Clause objection. We agree. Even if Kelley had established his allegation of error in failing to obtain a ruling on the Confrontation Clause objection, he did not demonstrate that admitting evidence that the victim had chlamydia prejudiced his defense. Kelley had the burden of proving the prejudice was real and had some demonstrable detrimental effect and not some abstract or theoretical effect. *See Lee v. State*, 2009 Ark. at 8, 308 S.W.3d at 603. We determined on direct appeal that the victim's testimony constituted substantial evidence to sustain the conviction. *Kelley*, 375 Ark. at 487, 292 S.W.3d at 300. We did not rely on Dr. Esquivel's testimony regarding the victim's STD. Instead, we stated that Dr. Esquivel's testimony proved that the victim was

nine-years old at the time of the incidents and that her examination of the victim's hymen suggested sexual assault. *Id.* Although Dr. Esquivel did testify that the victim tested positive for chlamydia, this evidence did not point to Kelley, as he was never tested. Accordingly, Kelley has not demonstrated that there is a reasonable probability that, but for his counsel's failure to obtain a ruling on his Confrontation Clause objection, the outcome of the proceedings would have been different. We conclude that the circuit court's denial of postconviction relief was not clear error.

Affirmed.

HANNAH, C.J., and DANIELSON, J., concur.

JIM HANNAH, Chief Justice, concurring. I concur in the decision to affirm the denial of Billy Joe Kelley's Rule 37.1 petition. However, this case should be affirmed based on a failure to meet the requirements of the first prong of the *Strickland* test. Counsel's representation did not fall below an objective standard of reasonableness. I do not agree that this case may be affirmed based on a lack of prejudice under the second prong of the *Strickland* test. Contrary to the majority's conclusion, the evidence of chlamydia was offered to point suspicion at Kelley and at no one else. It was highly prejudicial and was offered to identify Kelley as the perpetrator of the charged rape by showing that she was infected with chlamydia by sexual contact with Kelley.

In pretrial hearings, the State moved to preclude Kelley from arguing that the victim's stepbrothers infected her with chlamydia and for leave to put on evidence that Kelley refused a chlamydia test. In its opening statement, the State told the jury that Dr. Esquivel would

testify that the victim tested positive for chlamydia and that this was diagnostic of sexual assault, of which Kelley stood accused. Dr. Esquivel examined the victim to determine if the victim had been sexually assaulted. Dr. Esquivel is a physician and naturally treated the victim for the chlamydia, but in the context of this case, the issue of chlamydia was not only an issue of diagnosis, but was also a critical piece of evidence on which Dr. Esquivel based her opinion that the victim had been sexually assaulted. Dr. Esquivel testified as follows:

Q. Well, did you see any healing tissue anywhere?

A. No, no healing tissue except for the thin rimmed hymen. So I'm saying that it could indicate that there had been significant stretching of the tissue.

Q. It could?

A. It could.

Q. Not definitively?

A. Right.

Q. Not within a reasonable degree of medical certainty? Right?

A. Right.

Q. You wouldn't want to say that to the ladies and gentlemen of the jury?

A. Not based on that, but the fact that she had a positive sexually transmitted infection culture. That would raise the suspicion further.

Dr. Esquivel further testified that among the findings that “are 100 percent diagnostic for penetration or sexual assault, or abuse, are things such as . . . a sexually transmitted disease that would not have been able to have been contracted except by sexual means.” The State was trying to show the jury that Kelley was the source of the chlamydia so that the jury

would conclude that he had raped the victim. The evidence was highly prejudicial. Therefore, Kelley meets the requirements of the second prong of the *Strickland* test because he has shown that, had counsel's representation fallen below the required standard, there was a reasonable probability that the outcome would have been different. See *Lee v. State*, 2009 Ark. 255, at 4, 308 S.W.3d 596, 601 (quoting *Strickland v. Washington*, 466 U.S. 668, 694).

Nonetheless, this case should be affirmed because Kelley has failed to satisfy the first prong of the *Strickland* test, that counsel's representation fell below an objective standard of reasonableness. See *Lee*, 2009 Ark. at 3, 308 S.W.3d at 600 (quoting *Strickland*, 466 U.S. at 693). As the majority states, Kelley asserts that his trial counsel was ineffective for failure to obtain a ruling on his Confrontation Clause objection. Kelley's argument at trial was that he was being denied the opportunity "to confront the witness who actually tested the swab and says that it is chlamydia." On appeal, Kelley relies on *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 252 (2009). However, *Melendez-Diaz* was decided after Kelley was tried. In determining whether trial counsel's conduct is ineffective, the conduct is evaluated from counsel's perspective at the time. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "[C]ounsel's stewardship must be judged under the existing law at the time of trial and counsel cannot be deemed ineffective for failing to predict future developments or changes in the law." *Commonwealth v. Todaro*, 701 A.2d 1343, 1346 (Pa. 1997). *Melendez-Diaz* is not relevant in determining whether counsel's conduct was ineffective on a date before the case was decided. Therefore, the decision of the circuit court should be affirmed.

DANIELSON, J., joins.