STATE OF MAINE
CUMBERLAND, ss

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SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-06-2583 ✓

GREGORY ERSKINE,
Petitioner

v.

STATE OF MAINE,
Respondent

DECISION AND ORDER

Before the Court is Petitioner Gregory Erskine's ("Petitioner") Petition for Post-Conviction Review filed pursuant to 15 M.R.S.A. §§ 2121-2132. The Court held an evidentiary hearing on February 4, 2008. Attorney Luke Rioux appeared on behalf of Petitioner Gregory Erskine and Assistant Attorney General Donald Macomber appeared on behalf of the State. After considering the evidence, this Court denies Petitioner's Petition.

BACKGROUND

The Petitioner was convicted of murder in January 2005 after a jury trial in the Cumberland County Superior Court (Crowley, J.). This conviction and the sentence handed down were upheld by the Law Court in its January 2006 opinion, *State v. Erskine*, 2006 ME 5, 889 A.2d 312. Petitioner was represented by two attorneys during his trial: lead counsel Robert Ruffner, Esquire ("Ruffner") and Joel Vincent, Esquire.

The Petitioner did not testify at his trial. At the hearing on the Petitioner's Petition for Post-Conviction Review ("PCR hearing"), Attorney Ruffner stated that he advised Petitioner not to testify at trial because there was a police video of Petitioner's interrogation that could be used in lieu of Petitioner's testimony.

Attorney Ruffner testified that Petitioner "said everything he [Petitioner] needed to say in the police video." Moreover, Attorney Ruffner testified, using the video allowed Petitioner to avoid cross-examination and to avoid answering questions about why he violated certain bail conditions and prevented Petitioner from being impeached with evidence of prior crimes. Also at the PCR hearing, the Petitioner testified that he did not think that he could testify at trial because talking about the victim was too upsetting for him. The Petitioner continued, stating that at the time of trial he did not care whether or not he testified; he just wanted to die.

From May 2004 (approximately two weeks after Petitioner's arrest) until March 2005 (Petitioner's sentencing), the Petitioner was at Augusta Mental Health Institute ("AMHI") and Riverview. While extensive psychological evaluations were done by the State Forensic Service with respect to the issue of Petitioner's competence to stand trial, no report was ever sought from or submitted by the State Forensic Service on the issue of the Petitioner's criminal responsibility. Defense counsel did have an independent psychological evaluation done by Dr. Charles Robinson ("Robinson"). Because the Petitioner had a history of substance abuse, Dr. Robinson recommended that a psychological pharmacologist conduct an evaluation. Attorney Ruffner testified that he consulted with a psychological pharmacologist who told him that there was no defense based on the Petitioner's substance abuse. Attorney Ruffner further testified that he did not ask the State Forensic Service to evaluate the Petitioner's criminal responsibility because he believed that such an evaluation would produce only unfavorable evidence (Attorney Ruffner specifically mentioned malingering). In sum, Attorney Ruffner testified, between Dr.

Robinson's opinion, the psychological pharmacologist's opinion and the various reports he was receiving from the State Forensic Service, a "mental defense was simply not in the cards."

Dr. Ann LeBlanc ("LeBlanc"), the director of the State Forensic Service and a licensed psychologist, testified at the PCR hearing. She had the occasion to meet with the Petitioner often during his lengthy stay at AMHI and Riverview and submitted four reports to the Court concerning the Petitioner. Dr. LeBlanc confirmed that her reports addressed the issue of competency rather than criminal responsibility. When asked what more she would have done had she been asked to address the question of the Petitioner's criminal responsibility, Dr. LeBlanc responded that there was little more she would have done because the testing is the same for each issue, although she would have had more discussion with the Petitioner regarding the events of the night of the crime and his statements to the police and would have submitted a report specifically addressing the criminal responsibility question. Dr. LeBlanc further stated that had she been asked to render an opinion on the issue of criminal responsibility, she would have said that it was "highly unlikely" that the Petitioner was not functioning or had such a severe mental disorder that he was not capable of knowing what he was doing. Dr. LeBlanc stated that she believed that the Petitioner suffered from personality disorder, depression, anxiety, substance abuse, post traumatic stress disorder and had problems in his relationships with women, but that there was no evidence that the Petitioner was or ever had been psychotic.

The Petitioner now argues that he was ineffectively assisted by counsel at his trial because his defense attorneys failed to call him to testify at trial and

because his defense attorneys failed to obtain an evaluation of his criminal responsibility for the crime.

DISCUSSION

Both the United States Constitution and the Maine Constitution guarantee defendants the right of assistance of counsel in all criminal prosecutions. U.S. Const. amend. VI; Me. Const. art. I, § 6. These rights have been interpreted to guarantee defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Whitmore v. State*, 670 A.2d 394, 396 (Me. 1996).

The Law Court has established a two-prong test for adjudicating ineffective assistance of counsel claims. First, the Court must determine "whether there has been serious incompetency, inefficiency, or inattention of counsel amounting to performance...below what might be expected from an ordinary fallible attorney." *McGowan v. State*, 2006 ME 16, ¶ 11, 894 A.2d 493, 496-97 (quoting *Aldus v. State*, 2000 ME 47, ¶ 12, 748 A.2d 463, 467) (ellipsis in original). Second, the Court must determine "whether any such ineffective representation likely deprived the defendant of an otherwise available substantial ground of defense." *Id.* ¶ 11, 894 A.2d at 497 (quoting *Aldus v. State*, 2000 ME 47, ¶ 12, 748 A.2d 463, 467). The defendant/petitioner has the burden of proving both prongs. *Id.* ¶ 12, 894 A.2d at 497.

The Court finds that the Petitioner has failed to meet his burden with respect to both prongs. While the failure to meet one of the prongs is alone sufficient to deny a petition for post-conviction review, *McGowan*, 2006 ME 16, ¶ 13, 894 A.2d at 497, this Court will nonetheless briefly discuss its conclusions with respect to each prong.

The Petitioner has failed to show that the performance of his attorneys at trial fell below the performance expected of an ordinary fallible attorney. Indeed, Ruffner clearly stated at the PCR hearing that his strategy and reasons for choosing not to have the Petitioner testify was to avoid subjecting the Petitioner to cross-examination and possibly impeachment. Furthermore, the Petitioner has never stated that he wanted to testify at his trial; indeed, at the PCR hearing, the Petitioner reiterated that he "wanted to die" and did not care whether or not he testified.

Nor has the Petitioner shown that his attorneys' decision not to further pursue the issue of his criminal responsibility due to a possible mental disease or condition fell below the standard of an ordinary fallible attorney. Attorney Ruffner sought the opinions of an independent psychologist (Dr. Robinson) and a psychological pharmacologist. He also had the benefit of several reports from the State Forensic Service. The sum of these opinions and reports convinced Attorney Ruffner that a "mental defense was simply not in the cards."[1]

The Petitioner did not present any evidence that Attorney Ruffner erred in this assessment. Dr. LeBlanc testified that she would have stated that it was "highly unlikely" that the Petitioner suffered from a mental defect so severe that he did not know what he was doing on the night of the crime if she had been asked. The Petitioner did not provide any evidence from either Dr. Robinson or the psychological pharmacologist that either believed there was a potential mental defect argument in the Petitioner's case. Thus, the Petitioner has failed to

[1] In fact, these opinions and reports seemed to hint that the Petitioner was malingering, according to testimony from both Attorney Ruffner and Dr. LeBlanc at the PCR hearing. Thus, Attorney Ruffner's strategic decision not to seek and introduce further evaluations falls even further within the performance expected of a reasonable attorney.

meet his burden to show that his attorneys' decisions not to call the Petitioner to testify and not to pursue a mental defect defense fell below the performance expected of an ordinary fallible attorney.

For largely similar reasons, the Court finds that the Petitioner has failed to meet his burden as to the second prong. With respect to the second prong, the Law Court has stated that a defendant must establish either that "his attorney's performance deprived him of a substantial ground of defense, or that counsel's performance likely affected the outcome of the trial." *McGowan*, 2006 ME 16, ¶ 13, 894 A.2d at 497 (quoting *State v. Brewer*, 1997 ME 177, ¶ 20, 699 A.2d 1139, 1144). In the instant case, the testimony at the PCR hearing does not support a finding that the Petitioner's attorneys' performance deprived him of a defense or otherwise affected the outcome of his trial. As stated above, Dr. LeBlanc testified that she would have stated that it was "highly unlikely" that the Petitioner suffered from a mental defect such that he did not know what he was doing on the night of the crime had she been asked. Attorney Ruffner similarly testified that there was no basis for him to pursue a "mental defense" as both Dr. Robinson and the psychological pharmacologist stated that this was essentially a dead-end. The Petitioner did not provide any evidence from either Dr. Robinson or the psychological pharmacologist to refute Attorney Ruffner's conclusion nor did he produce any other evidence showing that there was a potential mental defect argument in the Petitioner's case.

Nor has the Petitioner met his burden to show that the decision of the Petitioner's attorneys to not call him to testify affected the outcome of the trial. First, the Petitioner stated both at the time of trial and at the PCR hearing that he did not want to testify as he did not think that he could talk about the victim.

Second, the Petitioner has not shown that Attorney Ruffner's reasons for not calling the Petitioner to testify (namely, to avoid cross-examination and impeachment) were outweighed by any potential benefits that likely would have changed his conviction.

For the reasons stated herein, the Petitioner has failed to meet his burden as to both prongs of his ineffective assistance of counsel claims.

Therefore, the entry is:

> Petitioner Gregory Erskine's Petition for Post-Conviction Review is DENIED.

Dated at Portland, Maine this 8th day of February, 2008.

Robert E. Crowley
Justice, Superior Court