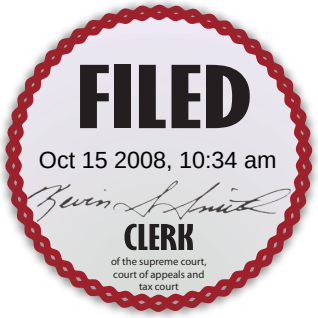


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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| JAMES SLACK, JR., | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A05-0804-PC-222 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
The Honorable Kathleen A. Sullivan, Magistrate
Cause No. 45G01-0608-PC-13

**October 15, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

James Slack, Jr. ("Slack") was convicted in Lake Superior Court of Class A felony voluntary manslaughter and Class A misdemeanor battery. After Slack's convictions and sentences were affirmed on direct appeal, he filed a petition for post-conviction relief alleging the ineffective assistance of trial counsel. The post-conviction court denied Slack's petition. Slack appeals and claims that the trial court erred in concluding that he was not denied the effective assistance of trial counsel. We affirm.

**Facts and Procedural History**

The facts underlying Slack's convictions were set forth in our memorandum decision on direct appeal:

> In 2004, Alesia Minter lived in Gary with her five-year-old daughter, C.J., her thirteen-year-old son, O.H., her sixteen-year-old son, Slack, and her twenty-year-old son, Keith Spencer. Michael Higgins, Minter's husband of nine years, also lived at her house during the week. Minter's one-story house had two bedrooms. Minter slept in one and C.J. slept in the other. Her three sons used the basement as their bedroom.
>
> On February 7, 2004, Minter was in her bedroom with Higgins, O.H. was in the basement, and Slack and C.J. were playing a videogame in C.J.'s room. C.J. was apparently upset because Slack had restarted the game. Minter asked Higgins to tell Slack to leave C.J.'s room. Higgins confronted Slack, and Minter heard Slack say, "I can't breathe, I can't breathe." Tr. p. 148. Higgins responded, "I know." Id. Higgins apparently let Slack go because Higgins returned to Minter's room and Slack walked toward the living room. Approximately a minute later, Higgins said, "[Slack], get back here," and followed after Slack. Id. at 151. Shortly thereafter, Minter heard several gunshots, and C.J. screamed. Minter ran to the living room and found that Higgins had been shot.
>
> While they were waiting for medical assistance, Slack returned to the living room, briefly fought with Minter, whom he bit on the arm, and left the house. When the police arrived, C.J. explained, "[M]y brother, [Slack], just killed my daddy."[1] Id. at 56. Higgins had been shot six times and died shortly thereafter.

[1] In our memorandum decision, we explained, "C.J. referred to Higgins as her father, even though he was her stepfather." Slack, slip op. at 3 n.1.

Slack v. State, No. 45A03-0504-CR-161 (Ind. Ct. App. Dec. 20, 2005), trans. denied.

On February 9, 2004, the State charged Slack with murder and Class C felony battery. A jury trial was held on January 10-14, 2005. During the trial, the jury asked Slack's mother, Minter, whether anyone in the house owned a gun, to which she responded, "No, not that I know of. I had a gun at one time, but it was – got stolen." Trial Tr. p. 279. The jury similarly asked Slack's brother, O.H., whether there were any guns in the house. He replied, "No. I didn't see any." Trial Tr. p. 314.

After this testimony, Slack's trial counsel, anticipating that the State would seek to introduce into evidence weapons and ammunition found by the police at the house, moved to exclude any such evidence. Slack's counsel based his objection on grounds of relevance.[2] The State responded that Slack's easy access to guns made it more probable that he was the shooter. Also, the State argued that if Minter and O.H.'s testimony that there were no guns in the house went unchallenged, the jury would be left with a false impression. Further, the State claimed that the weapons evidence would diminish Minter and O.H.'s credibility. Thus, the State argued that the weapons should be admitted as substantive evidence and for impeachment purposes. The trial court permitted the State to introduce the weapons evidence, concluding that it was relevant to show Slack's easy access to weapons and that the presence of the weapons bore on the credibility of Minter and O.H.'s testimony.

[2] Apparently, none of the weapons seized by the police was the weapon used to shoot Higgins.

The State then called as a witness the crime scene investigator, who had entered the house shortly after Higgins had been taken to the hospital. This investigator found six .40 caliber shell casings, four of which were found in the living room with one spent bullet, and two of which were found near the stairway to the basement along with a second spent bullet. Furthermore, several firearms were found in the basement, which was used as a bedroom for Slack and his brothers. Between a mattress set, the police found a 9mm pistol loaded with 32 rounds of ammunition; in a drawer the police found a M1-30 carbine with two magazines, one loaded with 27 rounds and the other with 30 rounds of ammunition; and a shotgun loaded with four shells was found in plain view. The crime scene investigator did not have a warrant to search the house. Yet, Slack's counsel made no objection based upon the propriety of the search which resulted in the discovery and seizure of the weapons.

The strategy of Slack's trial counsel was to argue that someone else had shot Higgins or, in the alternative, that Slack had acted in self-defense or in sudden heat. At the conclusion of the trial, the jury found Slack guilty of the lesser-included charges of voluntary manslaughter and Class A misdemeanor battery. The trial court sentenced Slack to twenty-five years on the voluntary manslaughter conviction and a concurrent one-year sentence for the battery conviction. Upon direct appeal, Slack claimed that the trial court erred in admitting evidence of guns found at the home which were not

connected with the shooting,[3] that the evidence was insufficient to rebut Slack's claim of self-defense, and that his sentence was inappropriate. We affirmed. Id. at 12.

Slack then filed a *pro se* petition for post-conviction relief on August 30, 2006, alleging the ineffective assistance of trial counsel. After the State Public Defender's office entered an appearance as counsel for Slack, he filed an amended petition on April 13, 2007. On May 4, 2007, the post-conviction court held a hearing on Slack's petition, and on February 21, 2008, the post-conviction court entered findings of fact and conclusions of law denying Slack's petition. Slack now appeals.

**Discussion and Decision**

A petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner appeals from a negative judgment. Id. As such, to prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id. at 643-44. We do not defer to the post-conviction court's legal conclusions, but the post-conviction court's factual findings will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. Id. at 644.

As explained by our supreme court in Overstreet v. State, 877 N.E.2d 144, 152 (Ind. 2007), to establish a violation of the Sixth Amendment right to effective assistance

[3] This argument was also based upon grounds of relevance.

of counsel, a defendant must establish before the post-conviction court the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, a defendant must show that counsel's performance was deficient, and this requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as counsel guaranteed to the defendant by the Sixth Amendment. Overstreet, 877 N.E.2d at 152. Second, a defendant must show that the deficient performance prejudiced the defense, and this requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. Id. A defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. The failure to satisfy either prong of the Strickland test will cause the claim to fail. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Slack claims that his trial counsel was ineffective for failing to argue that the weapons and ammunition found at the home should have been suppressed as the fruit of a warrantless search of the home. Although both parties spend considerable effort in arguing about the propriety of the warrantless search and the admissibility of the evidence found as a result thereof, we need not address these questions directly.[4] Even if

[4] We do note, however, that law enforcement officers are not permitted to search for evidence once a crime scene is secure simply because a homicide has occurred; instead, officers may make a prompt

we assume that the search was improper and that, for this reason, trial counsel should have objected to the admission of the evidence seized as a result of this search, we conclude that Slack has not met the second prong of the Strickland test. That is, Slack has failed to show that, but for counsel's allegedly unprofessional errors, the result of his trial would have been any different.

Slack emphasizes that, when arguing that the weapons evidence found at the house was relevant, the prosecution argued that this evidence was vital to its case. Slack therefore argues that, without this evidence, the result of the trial would have been different. Looking at the totality of the circumstances, however, we cannot agree.

We first note that part of Slack's trial strategy was to argue that he acted in self-defense or in sudden heat. Both of these strategies are affirmative defenses; they admit that Slack shot his stepfather, but they seek to negate or lessen the criminal culpability that would otherwise result from this action. See Clark v. State, 834 N.E.2d 153, 157 (Ind. Ct. App. 2005) (noting that voluntary manslaughter is an affirmative defense akin to self-defense), trans. denied. As far as these strategies were concerned, the weapons evidence was either essentially meaningless, or, in the case of a sudden heat defense, actually helpful. This evidence also bears on the question of whether Slack was the shooter, which the affirmative defenses of self-defense and voluntary manslaughter admit.

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warrantless search of the area to see if there are other victims or if a killer is still on the premises. Vanzo v. State, 738 N.E.2d 1061, 1063 n. 7 (Ind. Ct. App. 2000) (citing Mincey v. Arizona, 437 U.S. 385, 392 (1978)).

Slack's other trial strategy was to argue that someone else shot Higgins, possibly through a broken window. Certainly, the weapons evidence seized from the house was relevant to the question of who shot Higgins. However, we cannot ignore the other evidence indicating that Slack was the shooter.

Just minutes before the shooting, Slack and Higgins were involved in a physical altercation during which Slack appeared to be unable to breathe. The obvious inference is that Higgins had Slack in some sort of choke hold. Although Higgins let Slack go, he soon went after Slack again. Seconds later, Higgins was shot six times. When Slack entered the living room where Higgins lay bleeding, he bit his mother on the arm and left the house. Furthermore, when the police first arrived on the scene, Slack's sister told an officer, "my brother, [Slack], just killed my daddy." Trial Tr. p. 56. In light of this significant evidence that Slack shot Higgins, we cannot say that the result of the trial would have been any different even if Slack's trial counsel had objected and the weapons evidence had been excluded.

**Conclusion**

Slack has not shown that, but for counsel's alleged error in failing to object to the constitutionality of the search that led to the weapons evidence introduced against Slack at trial, the result of his trial would have been any different. Under these facts and circumstances, the post-conviction court did not err in concluding that Slack had not been denied the effective assistance of trial counsel.

Affirmed.

BAKER, C.J., and BROWN, J., concur.