DA 17-0664

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 250N

ROBERT ZLAHN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV-15-1570
Honorable Mary Jane Knisely, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Robert Zlahn, Self Represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Scott Twito, Yellowstone County Attorney, Billings, Montana

Submitted on Briefs: September 12, 2018

Decided: October 9, 2018

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Robert Zlahn appeals the Order of the Thirteenth Judicial District Court, Yellowstone County, dismissing his petition for postconviction relief (PCR). We affirm.

¶3 On July 24, 2012, Zlahn was convicted of assault with a weapon, criminal endangerment, and tampering with physical evidence, based on his involvement in a shooting in Billings. On March 8, 2013, Zlahn appealed his conviction. On August 19, 2014, we affirmed Zlahn's conviction.[1] On December 3, 2015, Zlahn filed a PCR petition, alleging ineffective assistance of counsel (IAC). On May 10, 2016, the District Court issued an order that dismissed several of Zlahn's claims, but allowed a single claim to proceed based on the allegation that Zlahn's trial counsel failed to call witnesses critical to the defense. The District Court ordered the State to respond. The State responded to Zlahn's claim and attached an affidavit from Zlahn's trial counsel. On June 21, 2016, Zlahn filed a Notice of Appeal before the State filed its response and the District Court could rule on the claim. This Court accepted the appeal. On January 31, 2017, after Zlahn previously obtained several extensions, this Court dismissed Zlahn's appeal for failure to

[1] *State v. Zlahn*, 2014 MT 224, ¶¶ 2, 45, 376 Mont. 245, 332 P.3d 247.

file an opening brief. On August 25, 2017, after the District Court reviewed the State's response, the District Court dismissed Zlahn's PCR petition in its entirety. Zlahn appeals.

¶4 We review a district court's denial of a PCR petition to determine whether its findings of fact are clearly erroneous and its conclusions of law are correct. *Wilkes v. State*, 2015 MT 243, ¶ 9, 380 Mont. 388, 355 P.3d 755. IAC claims present mixed questions of law and fact that we review de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. We review discretionary rulings, including rulings on whether to hold an evidentiary hearing, for abuse of discretion. *Wilkes*, ¶ 9.

¶5 A PCR petition must identify all facts that support the claims for relief. Section 46-21-104(1)(c), MCA; *Kelly v. State*, 2013 MT 21, ¶ 9, 368 Mont. 309, 300 P.3d 120. If the district court determines the petition and the record show the petitioner is not entitled to relief, the district court may dismiss the proceedings without requiring a response or without holding an evidentiary hearing. Section 46-21-201(1)(a), MCA; *see Lacey v. State*, 2017 MT 18, ¶ 40, 386 Mont. 204, 389 P.3d 233 (citation omitted). Consequently, a petitioner seeking to reverse a district court's denial of a PCR petition "bears a heavy burden." *State v. Cobell*, 2004 MT 46, ¶ 14, 320 Mont. 122, 86 P.3d 20 (citation omitted).

¶6 In assessing IAC claims, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *See Whitlow*, ¶ 10. The first prong of the *Strickland* test requires the defendant show his counsel's performance was deficient. *Strickland,* 466 U.S. at 687; *Whitlow*, ¶ 10. To demonstrate counsel's performance was deficient, the defendant must prove counsel's performance fell below an objective standard of reasonableness. *Whitlow*, ¶ 14. The second prong of the *Strickland* test requires the

defendant to prove his counsel's deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 687; *Whitlow*, ¶ 10. To show prejudice, the defendant alleging IAC must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Stock v. State*, 2014 MT 46, ¶ 19, 374 Mont. 80, 318 P.3d 1053 (citations omitted). If a petitioner fails to prevail on one prong, "there is no need to address the other prong." *Whitlow*, ¶ 11 (citations omitted).

¶7 Courts determine deficient performance based on whether a defendant's counsel acted within the broad "range of competence demanded of attorneys in criminal cases." *Schaff v. State*, 2003 MT 187, ¶ 18, 316 Mont. 453, 73 P.3d 806 (citation omitted). The Court will not speculate, and a silent record fails to rebut, the strong presumption counsel performed effectively. *State v. Lewis*, 2007 MT 16, ¶ 21, 335 Mont. 331, 151 P.3d 883 (citation omitted). IAC claims require facts, not merely conclusory allegations. Section 46-21-104, MCA; *State v. Wright*, 2001 MT 282, ¶ 31, 307 Mont. 349, 42 P.3d 753.

¶8 Zlahn argues his trial counsel provided ineffective assistance by failing to call Amber Scally (Amber) as an eyewitness, the wife of another eyewitness Keelan Scally (Keelan). Zlahn argues Amber's testimony would have contradicted other accounts because she called 911 and gave the description. Zlahn also argues his trial counsel failed to find and use an alibi witness named "Derek," and that counsel instructed him not to mention Derek was lost as a witness during proceedings. Finally, Zlahn argues he is entitled to an evidentiary hearing to present evidence in support of his claims.

¶9 The State counters there is ample evidence in the record to demonstrate the strategic nature of trial counsel's choice not to call Amber or locate Derek. Counsel followed up

with both witnesses, and based on the defense's theory of the case that Zlahn's friend Samuel Bettie was the perpetrator, counsel chose what evidence to present and witnesses to call. The State also argues Zlahn's contention counsel instructed him not to mention the loss of Derek as an alibi witness is conclusory and without support, and Zlahn's request for an evidentiary hearing was properly denied based on his failure to state a claim for relief. We agree.

¶10 It was objectively reasonable for trial counsel not to call Amber as an eyewitness. *See Whitlow*, ¶ 14. The defense's theory of the case was that Bettie, and not Zlahn, was the perpetrator. Counsel believed Keelan provided a description that better supported the defense's theory. Amber also previously stated in interviews that she had been more focused on the victims of the shooting rather than the occupants of the vehicle. Counsel's decision not to call Amber was consistent with the defense's theory of the case and did not constitute deficient performance. *See Strickland*, 466 U.S. at 687; *Stock*, ¶ 19; *Whitlow*, ¶ 10. Counsel's choice not to call Amber fell within the deference afforded to defense counsel, and accordingly, Zlahn fails to overcome the strong presumption counsel performed effectively. *See Lewis*, ¶ 21; *Schaff*, ¶ 18.

¶11 Likewise, it was objectively reasonable for trial counsel not to further pursue locating an alibi witness known only by his first name. *See Whitlow*, ¶ 14. The record indicates counsel discussed various means of identifying Derek with Zlahn given the lack of information, and counsel weighed locating Derek appropriately based on the defense's theory. Given counsel's efforts, the defense's theory at trial, and the lack of identifying information on Derek, it was objectively reasonable for counsel not to find Derek. *See*

Whitlow, ¶ 14. Counsel's decision to not locate Derek fell within the deference afforded to defense counsel and did not amount to deficient performance. *See Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10; *Schaff*, ¶ 18.

¶12 Based on the record, Zlahn's claims do not reveal an entitlement to relief, and the Court does not need information beyond the record to address Zlahn's claims. Section 46-21-201(1)(a), MCA; *Lacey*, ¶ 40. The District Court did not abuse its discretion in denying Zlahn an evidentiary hearing. *Wilkes*, ¶ 9. Accordingly, Zlahn fails to meet the "heavy burden" required to reverse the District Court's denial of the PCR Petition. *See Cobell*, ¶ 14.

¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ JIM RICE
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON