DA 16-0596

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 234N

JEREMY JOHN BRAULICK,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DV 16-118
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jeremy John Braulick, Self-represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Kendra Lassiter, Park County Attorney, Livingston, Montana

Submitted on Briefs: July 31, 2019

Decided: October 1, 2019

Filed:

Clerk

Justice Jim Rice 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 Appellant Jeremy John Braulick (Braulick) appeals the denial of his petition for postconviction relief by the Sixth Judicial District Court, Park County. We affirm.

¶3 In December of 2011, Braulick brutally attacked his Mother and Stepfather in their home, where he was temporarily staying, by hitting, choking, and stabbing them multiple times with a knife. *State v. Braulick*, 2015 MT 147, ¶¶ 3-6, 379 Mont. 302, 293 P.3d 508. The victims, who somehow survived the attacks, testified at trial. Braulick was convicted of two counts of attempted deliberate homicide and was sentenced to 90 years in Montana State Prison. *Braulick*, ¶ 12.

¶4 On appeal, this Court affirmed Braulick's convictions. *Braulick*, ¶ 26. Braulick filed a postconviction petition stating fifteen grounds for relief under three general claims, including ineffective assistance of counsel, prosecutorial misconduct, and cruel and unusual punishment arising from the manner of his detention pending trial. The District Court addressed each ground for relief and denied and dismissed the petition, concluding in part that Braulick's ineffective assistance of counsel and prosecutorial misconduct claims were procedurally barred under § 46-21-105, MCA, because the claims should have

been brought by Braulick in his direct appeal. The District Court reasoned that Braulick's cruel and unusual punishment claim was a separate matter and not appropriately raised in a postconviction relief proceeding. Braulick appeals, challenging the District Court's determination that his claims were procedurally barred or inappropriately raised.

¶5 This Court reviews a district court's denial of a petition for postconviction relief to determine whether its factual findings are clearly erroneous and whether its legal conclusions are correct. *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387 (citing *Rukes v. State*, 2013 MT 56, ¶ 8, 369 Mont. 215, 297 P.3d 1195). Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo. *Rose*, ¶ 15 (citing *Miller v. State*, 2012 MT 131, ¶ 9, 365 Mont. 264, 280 P.3d 272).

¶6 In a postconviction proceeding, a criminal defendant may raise issues relating to his conviction or sentence if he had "no adequate remedy of appeal." Section 46-21-101(1), MCA. Accordingly, § 46-21-105, MCA, provides:

> (2) When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a [postconviction relief proceeding]. . . .
>
> (3) For purposes of this section, "grounds for relief" includes all legal and factual issues that were or could have been raised in support of petitioner's claim for relief.

Ineffective assistance of counsel claims will be reviewed on direct appeal from conviction "when the record is sufficient for review." *State v. Baker*, 2013 MT 113, ¶ 42, 370 Mont. 43, 300 P.3d 696. However, when the face of the record does not reveal "why" counsel took a particular course of action, the matter is appropriately raised in postconviction

proceedings. *Baker*, ¶ 42 (citing *State v. Briscoe*, 2012 MT 152, ¶ 10, 365 Mont. 383, 282 P.3d 657). Courts determine whether counsel was ineffective by application of the two-part test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Under the *Strickland* test, the defendant must prove "(1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *Whitlow*, ¶ 10 (citing *State v. Racz*, 2007 MT 244, ¶ 22, 339 Mont. 218, 168 P.3d 685). If the petitioner cannot satisfy both of these elements, his ineffective assistance claim will be denied. *Whitlow*, ¶ 11.

¶7 Braulick alleges his trial counsel was ineffective in numerous ways, including failing to adequately impeach witnesses, failing to conduct a thorough investigation, failing to suppress an image from a victim's surgery, not objecting to several prosecution statements, and failing to argue for a better plea deal based upon Braulick's self-diagnosed health condition.[1] Braulick's argument regarding his inability to raise these issues on direct appeal from his conviction is well taken: the reason "why" trial counsel took or failed to take these actions is not explained on the face of the trial record, and therefore, the claims could not be raised on direct appeal, contrary to the District Court's conclusion.

[1] Specifically, Braulick argues his trial counsel failed to diagnose him with a rare form of hypothyroidism that he believes could explain why he attacked his Mother and Stepfather. Braulick has never been diagnosed with this rare health condition. He argues his counsel should have known he suffered from this condition because he had symptoms such as weight gain and depression. He asserts that if his counsel had adequately observed his problems, counsel "probably" would have discovered the rare form of hypothyroidism, and could have argued for a better plea deal or presented the disease as a mitigating factor at trial.

Consequently, the claims were not procedurally barred and could be properly raised in a postconviction proceeding.[2]

¶8 However, as the State argues, even if the claims were not procedurally barred, they fail on other grounds, and this Court can properly affirm the District Court on alternative grounds. Under the first *Strickland* prong, the court applies a "strong presumption" that counsel's conduct was reasonable. *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). Likewise, the defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). Here, Braulick has not presented evidence to overcome the strong presumption of reasonableness. Trial counsel navigated difficult terrain in defending a violent assault upon victims, members of the Defendant's family, who survived and testified about the attack. Counsel's approach to attempting impeachment of the victim witnesses, objecting to the prosecution's presentation of the victims' stories and photos of the victims' wounds, and presenting evidence of his client's defense, were clearly matters of delicate trial strategy that Braulick has not demonstrated were unreasonable and below a lawyer's standard of performance. Likewise, Braulick has not demonstrated his counsel's failure to diagnose a rare health condition that may have altered his approach to plea negotiation falls below a standard of reasonableness. Therefore, Braulick had not established the first prong of *Strickland,*

[2] Notably, this determination eliminates the need for Braulick's claim, raised for the first time on appeal in this proceeding, that his appellate counsel was ineffective for failing to raise his ineffectiveness claims against his trial counsel on direct appeal.

which alone invalidates his ineffective assistance of counsel claim. Even if he had done so, Braulick cannot satisfy the second *Strickland* prong of demonstrating prejudice, which requires a defendant to prove a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *State v. Miner*, 2012 MT 20, ¶ 12, 364 Mont. 1, 271 P.3d 56 (citing *State v. Gunderson*, 2010 MT 166, ¶ 67, 357 Mont. 142, 237 P.3d 74). The asserted errors against counsel do not undermine the overwhelming direct evidence of Braulick's guilt, including the compelling testimony of Braulick's Mother and Stepfather. Regarding Braulick's health diagnosis, Braulick can only argue that his counsel "probably" would have discovered his rare condition had counsel investigated it further. Because Braulick cannot meet either prong of the *Strickland* test, and both are necessary to prove his claim, the District Court did not err in denying his postconviction relief petition based on ineffective assistance of counsel.

¶9 Braulick alleges the Prosecutor at his trial made material misstatements of fact, knowingly presented false testimony, made personal comments about Braulick's guilt, made improper remarks about Braulick, made personal comments about the victims' credibility, and violated Braulick's post-arrest right to remain silent by making comments regarding Braulick's post-arrest statements at trial. All of these allegations are "record based" claims clearly reflected on the trial record, and thus, should have been raised on direct appeal from the conviction, but, in any event, Braulick has not established that they rise to error that would alter the outcome of the trial under the second prong of *Strickland*.

Thus, the District Court did not err in finding the prosecutorial misconduct claims were procedurally barred under § 46-21-105, MCA.

¶10 Finally, the District Court did not err by denying Braulick's "cruel and unusual punishment" claim that is based upon the conditions of his pre-trial confinement. Even if arguably related to his trial, the claim is based on events occurring during his pretrial incarceration, and therefore "could reasonably have been raised on direct appeal[.]" Section 46-21-105(2), MCA. Therefore, the claim is procedurally barred. *See, e.g.*, *Basto v. State*, 2004 MT 257, ¶¶ 17-18, 323 Mont. 80, 97 P.3d 1113. Further, Braulick's allegations are speculative and unsupported, failing to satisfy basic statutory postconviction requirements. *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473 ("[u]nlike civil complaints, the postconviction statutes are demanding in their pleading requirements."). Therefore, the District Court did not err in denying the claim.

¶11 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. Except as otherwise discussed herein, the District Court's interpretation and application of the law were correct, and its findings of fact are not clearly erroneous. All of Braulick's other claims were procedurally barred.

¶12 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON