

DA 20-0303

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 322N

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BRIAN JOHN TEMPLE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. DDV 2018-93  
Honorable James P. Reynolds, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Nick K. Brooke, Smith & Stephens, P.C., Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant  
Attorney General, Helena, Montana

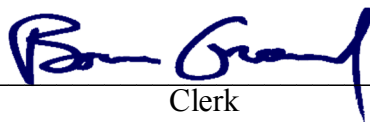
Leo Gallagher, Lewis and Clark County Attorney, Helena, Montana

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Submitted on Briefs: November 17, 2021

Decided: December 21, 2021

Filed:

  
Clerk

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Justice Ingrid Gustafson 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 Brian John Temple (Temple) appeals from the April 6, 2020 Order of the First Judicial District Court, Lewis and Clark County, denying his petition for postconviction relief (PCR), as he failed to meet pleading standards, failed to demonstrate his counsel was deficient, and failed to demonstrate he was prejudiced by counsel's performance. We affirm.

¶3 In his PCR petition and notices of supplemental facts, Temple asserted his trial counsel was ineffective by failing to obtain records from CVS pharmacy, showing Temple obtained Oxycodone through valid prescriptions on April 6, April 11, April 19, and April 29 (five days before his arrest), in addition to the April 2 prescription admitted at trial; failing to address that it was not unlawful to crush, heat, and inject a prescription drug obtained pursuant to a valid prescription; and failing to interview and call Linda and Brian Graham, who would have testified that some of the coins Temple was alleged to have stolen

from Miller's Coin Shop were actually owned by the Grahams and given to Temple.<sup>1</sup> To provide context for these claims some background information is necessary.

¶4 In May 2011, Temple was charged with assault on a peace officer, obstructing a peace officer, criminal possession of drug paraphernalia (for possessing a “drug kit” consisting of a spoon, tourniquet, pill crusher, and syringe), and theft (based on theft of valuable coins from Wayne Miller Coins). After laboratory analysis confirmed residue on the spoon was Oxycodone, the State added a felony charge of criminal possession of dangerous drugs. Prior to trial, the District Court granted Temple’s motion to dismiss the assault on a peace officer charge. Temple proceeded to jury trial on the remaining charges.

¶5 At trial, Temple admitted to possessing drug paraphernalia and Oxycodone. His defense was that he had filled a legally valid prescription in April 2011, and therefore, his possession of the residue on the spoon was legal. At the close of trial, the District Court instructed the jury on the elements of criminal possession of dangerous drugs and that Temple could assert as a defense that he had obtained the Oxycodone pursuant to a valid prescription. During deliberations, the jury appeared to struggle not with whether Temple had a valid prescription but with the method of use of the Oxycodone prescription:

The jury asked the court during deliberations whether crushing prescription Oxycodone violated the law. The court declined to answer and referred the jury to the original instructions.

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<sup>1</sup> In his Reply Brief, Temple clarifies he is “no longer pursuing” any claim regarding an error with his theft conviction. As such, we do not address any of Temple’s prior IAC allegations regarding failure to call the Grahams as witnesses.

Neither party had proposed an instruction on the legality of crushing prescription Oxycodone, and the court gave no such instruction in its initial charge to the jury. But during deliberations, the jury sent a note with the following questions: (1) “According to the law, when you alter the form of a prescription drug . . . by either applying heat or crushing, does that change the chemical compound of the drug?”; and (2) “If so, does that chemical change make it illegal?” The court responded with the statement, “You are instructed to rely on your collective memory of the testimony and evidence presented.”

The jury sent another note, asking, “Is it illegal to crush Schedule II Oxycodone?” Temple’s counsel urged the court to answer “no,” arguing that the relevant statutes did not criminalize such conduct. The court acknowledged that the legality of crushing Oxycodone was “obviously . . . tying [the jury] up.” Nonetheless, the court responded to the jury, “You are instructed to rely on your collective memory of the testimony and evidence presented and on the instructions previously given.”

*State v. Temple*, 2016 MT 284, ¶¶ 1, 7, 8, 385 Mont. 287, 384 P.3d 54 (second, third, and fourth alterations in original).

¶6 Temple was convicted of all remaining charges. Temple appealed, arguing the District Court abused its discretion in refusing to further instruct the jury on the legality of crushing prescription Oxycodone. *Temple*, ¶ 9. Upon review of the evidentiary presentation and instructions, this Court concluded:

The trial court charged the jury on the elements of the crime charged and on Temple's “ultimate user” defense using the language of the controlling statutes. The relevant statutes do not speak directly to the issue the jury raised during deliberations. The District Court was obligated to instruct the jury only as to “the law applicable to the case,” [*State v.*] *Bieber*, [2007 MT 262,] ¶ 67, [339 Mont. 309, 170 P.3d 444,] not as to a legal question on which the parties had not been heard prior to the jury’s retiring to deliberate and on which the law presented no clear answer. There is no abuse of discretion if, as a whole, the instructions fairly and fully covered the applicable law.

The outcome of this case hinged on the jury's determination of whether the Oxycodone found in Temple’s possession in May 2011 was obtained “pursuant to” his April 2, 2011 prescription. Section 50-32-302(3), MCA. We conclude that the court’s initial instructions on the “ultimate user”

defense, using the phrases “under a valid prescription” and “pursuant to a valid prescription,” fulfilled its obligation to “fully and fairly instruct the jury on the law applicable to the case.” *Bieber*, ¶ 67. Its decision to refer the jury back to the instructions in response to the jury’s questions did not constitute an abuse of discretion.

*Temple*, ¶¶ 17-18 (additional citations omitted).

¶7 IAC claims are mixed questions of law and fact that we review de novo. *State v. Rodriguez*, 2021 MT 65, ¶ 16, 403 Mont. 360, 483 P.3d 1080.

¶8 Article II, Section 24, of the Montana Constitution and the Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, guarantee a defendant the right to effective assistance of counsel. *See State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095.

¶9 A PCR petition must identify all facts that support the claims for relief. *See* § 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. 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.

¶10 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 Kougl*, ¶ 11. Under the *Strickland* test, the defendant must (1) demonstrate that “counsel’s performance was deficient or fell

below an objective standard of reasonableness” and (2) “establish prejudice by demonstrating that there was a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different.” *Kougl*, ¶ 11 (quoting *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234). 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. A strong presumption exists that counsel’s conduct falls within the wide range of reasonable professional conduct. *See Kougl*, ¶ 11. A defendant must satisfy both prongs of this test in order to prevail on an ineffective assistance of counsel claim. If a petitioner fails to prevail on one prong, “there is no need to address the other prong.” *Whitlow v. State*, 2008 MT 140, ¶ 11, 343 Mont. 90, 183 P.3d 861.

**No IAC related to not obtaining and presenting later Oxycodone prescriptions.**

¶11 Temple asserts his trial counsel was ineffective for failing to obtain, and present CVS prescription records, which Temple obtained posttrial and submitted in supplementation of his PCR petition, showing Temple had filled prescriptions for Oxycodone on April 6 (60 pills), April 11 (60 pills), April 19 (60 pills), and April 29 (60 pills) and the District Court erred in not considering these prescriptions as they were not accompanied by an affidavit. Temple asserts presentation of these prescriptions at trial would have bolstered his defense theory by showing valid ongoing prescriptions, including the one—that of April 29—five days before his arrest, rather than only the prescription of

April 2 for 20 pills—five weeks before arrest—which was submitted into evidence by his counsel at trial.<sup>2</sup>

¶12 The District Court denied Temple's PCR claim relating to the additional prescriptions, concluding they were not properly before the court, as when they were presented in supplement to the PCR petition, they were not accompanied by an affidavit. The State concedes the District Court erred in interpreting § 46-21-104(1)(c), MCA, to require an affidavit accompany records supplementing a PCR petition, but nevertheless correctly concluded on the merits that Temple did not demonstrate trial counsel was ineffective for failing to obtain the subject prescriptions. The State asserts although obtaining the CVS prescription records may have been easy, Temple failed to demonstrate his counsel was on notice Temple filled additional Oxycodone prescriptions after April 2. Trial counsel obtained Temple's medical records from Dr. Martin, an orthopedic surgeon. Those records fail to demonstrate Dr. Martin prescribed Oxycodone to Temple.<sup>3</sup> Further, at trial, Temple's counsel presented testimony of the OPD investigator he used to investigate the case. That investigator obtained Temple's medical records and spoke with one of Temple's doctors. The State asserts Temple's counsel was not ineffective and conducted a reasonable investigation of the possession charge by obtaining Temple's

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<sup>2</sup> Temple asserts the State's arguments exacerbated the prejudice of not presenting the prescriptions filled after April 2 when it pointed out that the prescription dosage of 4 pills per day would not have lasted to May, when Temple was arrested—significantly undercutting Temple's defense.

<sup>3</sup> These records indicated Dr. Martin prescribed Temple Ultram, not Oxycodone, on April 8 and do not indicate any prescription on April 19.

medical records, working with his investigator, and presenting the evidence of the investigation at trial. Temple's medical records provided no basis for counsel to believe additional CVS records would demonstrate Temple filled valid Oxycodone prescriptions after April 2.<sup>4</sup> We agree with the State.

¶13 Temple's trial counsel conducted a reasonable investigation by employing an investigator and working with that investigator to obtain Temple's medical records and communicate with Temple's doctor's office. Although Temple testified at trial, he did not testify to the existence of Oxycodone prescriptions written and filled after April 2. The record is absent of information that would reasonably put Temple's trial counsel on notice such prescriptions existed let alone where they were located. Temple has not demonstrated his trial counsel's failure to obtain CVS prescription records post April 2, 2011, was deficient; thus, he has not satisfied the first *Strickland* prong and we need not consider the second prong with regard to this IAC claim.

**No IAC related to addressing the legality of Temple's method of use—crushing, melting, and injecting Oxycodone.**

¶14 Next, Temple asserts his trial counsel was ineffective by failing to argue or provide a complete jury instruction that his method of Oxycodone use—crushing, burning, and

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<sup>4</sup> The State also notes that Temple's PCR counsel did not locate the CVS prescription records for nearly a year and a half after he filed Temple's PCR petition, suggesting he, too, was not aware the records existed. The State further questions whether Temple had a valid prescription for Oxycodone written by a doctor after April 2 given the inconsistency between Temple's medical records and the CVS records—i.e. the CVS records show Temple filling an Oxycodone prescription from Dr. Martin on April 6, but Dr. Martin's records indicate he did not see Temple until April 8, at which time he prescribed Temple a different drug.



injecting—did not render his possession under a valid prescription illegal. Temple asserts Montana’s controlled substance statute does not explicitly require conformity with prescribed use. Temple asserts the jury instruction given at trial only required he obtain the drug pursuant to a legal prescription, not adhere to the prescription’s directions for use, to rebut the State’s charge of possession and his counsel was ineffective by failing to argue or underscore this fact for the jury. The State counters that counsel sufficiently raised the defense by obtaining the instruction he did and, as this Court concluded in *Temple*, ¶ 17, “the law presented no clear answer” as to whether failure to follow a prescription’s use directions constituted a possession violation. The State further asserts the jurisprudence from other states Temple relies on to assert that method of use does not render possession illegal did not yet exist or did not involve changing the form—crushing, melting, etc.—of the drug, such that Temple’s counsel’s failure to rely on these out-of-state cases was not deficient.<sup>5</sup> We agree with the State.

¶15 Temple’s trial counsel raised the defense that method of use inconsistent with the prescription’s directions for use did not render possession illegal. As we noted in *Temple*, the law presented no clear directive that this was the case and the State argues when applicable statutes from Title 45, ch. 9, MCA, and Title 50, ch. 32, MCA, are read together,

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<sup>5</sup> Temple cites two cases—one from Missouri and the other from Arkansas—holding that the method of use did not render possession illegal. The Missouri case, *State v. Graham*, 516 S.W. 3d 925 (Mo. Ct. App. 2017), however, was decided four years after Temple’s 2013 trial and the Arkansas case, *Wilson v. State*, 720 S.W.2d 292 (Ark. 1986), did not involve a situation where the defendant changed the form of the drug but rather involved the situation where the defendant intended to give the drug prescribed for him to his wife.

the method Temple used to take the Oxycodone rendered his possession illegal. Nevertheless, Temple's trial counsel argued for and obtained a jury instruction, which instructed the jury that to rebut the State's assertion he was in criminal possession of dangerous drugs, Temple "may raise the defense that he obtained the drug alleged in the charge pursuant to a valid prescription." Upon the jury questioning whether applying heat or crushing a prescription drug changed its chemical compound, Temple's trial counsel advocated the District Court answer "no" to the question. When the jury later asked, "Is it illegal to crush Schedule II oxycodone?", Temple's trial counsel advocated to the District Court the answer "is clearly no. There's no differentiation made in the statute or during the case, even indirectly, about crushing the pill was a criminal activity in any way, nor does the statute talk about that." In hindsight, we could second-guess, in light of the guilty verdict, whether Temple's trial counsel could have more thoroughly argued or underscored the jury instruction he obtained. But a "fair assessment" of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight" and "evaluate the conduct from counsel's perspective at the time." *Whitlow*, ¶ 31 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). The trial record does not establish his performance fell below an objective standard of reasonableness considering all the circumstances. Temple's trial counsel raised the defense that method of use does not render possession illegal and successfully obtained a jury instruction that it was a defense to the charge of criminal possession of a dangerous drug to show Temple obtained the drug pursuant to a valid prescription. While hindsight may suggest a better way to argue or

underscore this for the jury, under the dynamic circumstances of real-world trial presentation, we cannot say the way in which trial counsel defended the case to be below an objective standard of reasonableness. Temple has failed to establish his trial counsel's performance was deficient as to this IAC claim. As Temple has not satisfied the first *Strickland* prong, we need not consider the second prong.

**Other professional deficiencies.**

¶16 Finally, Temple asserts the District Court erred when addressing his PCR claims in not considering his counsel's other professional deficiencies, which eventually resulted in his trial counsel being disbarred.<sup>6</sup> Temple "wonders" whether his trial counsel provided similar representation in this case that he did in the other cases leading to his disbarment. We agree with the State that this speculation does not demonstrate a link between Temple's trial counsel's performance in this action and his violations of professional conduct in other non-related matters. Although egregious, counsel's failure to others does not establish per se deficient performance in the case. As indicated above, Temple has failed to establish his trial counsel's performance was deficient as to his specific IAC claims and we decline to conclude his deficiencies in other non-related cases evidence IAC here.

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<sup>6</sup> Temple's trial counsel was disciplined and later disbarred for failing to take required actions and abandonment of clients in civil cases. *See In re Freedman*, No. PR 16-0239, Order (Mont. Dec. 6, 2016); *In re Freedman*, No. PR 18-0034, Order (Mont. Oct. 30, 2018); *In re Freedman*, No. PR 18-0516, Order (Mont. June 18, 2019).

¶17 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.

¶18 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE