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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 224

Ashley Kenneth Hunter,

Petitioner and Appellant

v.

State of North Dakota,

Respondent and Appellee

No. 20200160

Appeal from the District Court of Cass County, East Central Judicial District,
the Honorable Stephanie N. Stiel, Judge.

AFFIRMED.

Opinion of the Court by Crothers, Justice.

Kiara C. Kraus-Parr, Grand Forks, ND, for petitioner and appellant.

Birch P. Burdick, State's Attorney, Fargo, ND, for respondent and appellee.

Hunter v. State
No. 20200160

Crothers, Justice.

[¶1] Ashley Hunter appeals from an order denying his application for post-conviction relief, arguing the district court abused its discretion in determining res judicata barred his claim of judicial bias and that he did not receive a Miranda warning. Hunter also argues the district court erred in denying his claims for ineffective assistance of counsel. We affirm.

I

[¶2] Hunter was charged with two counts of murder and one count of arson. After a nine-day jury trial, he was found guilty of all charges. Hunter appealed and the convictions were affirmed in *State v. Hunter*, 2018 ND 173, 914 N.W.2d 527. On that direct appeal, Hunter argued the district court erred in denying his motion to suppress because the State failed to establish he was given a Miranda warning and he knowingly and voluntarily waived his constitutional rights. Hunter also argued the court erred by excluding opinion testimony regarding false confessions. Hunter further argued his due process rights were violated because the trial judge was biased and failed to disqualify himself.

[¶3] Hunter applied for post-conviction relief, arguing he was entitled to relief because (1) the judge was biased; (2) his confession was unconstitutionally acquired; and (3) he received ineffective assistance of counsel. Prior to the January 8, 2020 evidentiary hearing the State asserted affirmative defenses of res judicata and misuse of process, citing N.D.C.C. § 29-32.1-12. The State sought and obtained leave of court to assert the affirmative defenses more than 30 days after Hunter's application was filed. Hunter argued the first two issues were not barred by res judicata or misuse of process because the issues are intertwined with his ineffective assistance of counsel claims.

[¶4] The district court found the issues of judicial bias and Hunter's alleged unconstitutionally obtained confession were barred by res judicata. The court also found Hunter did not prove his claims of ineffective assistance of counsel and denied Hunter's claims for post-conviction relief.

II

[¶5] Hunter argues the district court erred in finding res judicata barred the claims that his confession was unconstitutionally obtained and that the trial judge was biased. Hunter argues these claims were not fully and completely developed on his previous appeal. Hunter also argues these claims are intertwined with his claims of ineffective assistance of counsel so that the doctrine of res judicata does not apply.

[¶6] Relief may be denied as res judicata under N.D.C.C. § 29-32.1-12(1) if the same claim or claims were “fully and finally determined in a previous proceeding.” *Steen v. State*, 2007 ND 123, ¶ 13, 736 N.W.2d 457. “Defendants are not entitled to post-conviction relief when their claims are variations of previous claims that have been rejected.” *Jensen v. State*, 2004 ND 200, ¶ 9, 688 N.W.2d 374. Res judicata bars a claim in a post-conviction relief proceeding that was decided on direct appeal. *Red Paint v. State*, 2002 ND 27, ¶¶ 10-11, 639 N.W.2d 503.

[¶7] To the extent Hunter attempts to re-argue judicial bias and the unconstitutionality of his confession, those issues are barred by res judicata. This Court extensively discussed Hunter’s confession claim in *Hunter*, 2018 ND 173, ¶¶ 9-20. We held, “[t]he evidence supports the district court’s finding that Hunter was given a Miranda warning, and we conclude there is sufficient competent evidence to support the finding and it is not contrary to the manifest weight of the evidence.” *Hunter*, at ¶ 16. Hunter also argued on his direct appeal that his due process rights were violated because the judge failed to recuse himself. *Id.* at ¶ 48. He claimed the trial judge was biased and it affected his rulings on the Miranda issue and on the decisions to exclude expert witness testimony. *Id.* This Court rejected those claims, stating “[i]f Hunter’s demand intended to rely on bias, his allegations in the motion were too vague.” *Id.* at ¶ 51.

[¶8] Hunter’s claims of judicial bias and that his confession was unconstitutionally obtained were decided on direct appeal. We will not revisit those claims, and we reject the argument that the claims can be revived in this

post-conviction relief proceeding by combining them with allegations of ineffective assistance of counsel.

III

[¶9] Hunter argues he received ineffective assistance of counsel when his lawyer did not attempt to hire an expert on false confessions until a week before trial. Hunter also argues trial counsel was ineffective for failing to move to disqualify the trial judge for bias, and failing to provide the court with sufficient evidence he was properly Mirandized.

[¶10] Post-conviction proceedings are civil and the applicant has the burden of establishing the grounds for relief. *Rourke v. State*, 2018 ND 137, ¶ 5, 912 N.W.2d 311. To succeed on a claim for ineffective assistance of counsel, the applicant must show: (1) counsel’s representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The *Strickland* test is a high bar and must be applied with scrupulous care. *Rourke*, at ¶ 5.

[¶11] The standard of review in post-conviction proceedings is well established:

“A trial court’s findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding.”

Brewer v. State, 2019 ND 69, ¶ 4, 924 N.W.2d 87 (citations omitted). The question of ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. *Id.* at ¶ 5. However, “[e]ven under de novo review, the standard for judging counsel’s representation is a most deferential

one It is all too tempting to second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*

[¶12] To establish the first prong, the applicant must “overcome the ‘strong presumption’ that trial counsel’s representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight.” *Rourke*, 2018 ND 137, ¶ 5 (quoting *Laib v. State*, 2005 ND 187, ¶ 9, 705 N.W.2d 845). An unsuccessful trial strategy does not make for defective assistance of counsel. *Brewer*, 2019 ND 69, ¶ 6.

[¶13] To establish the second prong, “the defendant must specify how and where trial counsel was incompetent and the probable different result.” *Brewer*, 2019 ND 69, ¶ 9 (quoting *Middleton v. State*, 2014 ND 144, ¶ 6, 849 N.W.2d 196). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Brewer*, at ¶ 9 (quoting *Middleton*, at ¶ 6; *Strickland*, 466 U.S. at 694). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Rourke*, 2018 ND 137, ¶ 6.

A

[¶14] Hunter argues his trial counsel was ineffective by not requesting a continuance to obtain expert testimony that his confession was false. At trial, counsel only sought to admit general testimony about false confessions. Hunter now argues that his confession would have been suppressed with new expert testimony that his confession was coerced, and that counsel’s failure to request a continuance was prejudicial. Rejecting the claim, the district court found:

“It is unlikely the trial court would have granted a continuance even if it had been requested. During a March 8, 2017 hearing, the trial court told counsel that the trial date was not going to change. The case had been pending since June of 2015 and was almost two years old. The trial court made it clear that it fully expected counsel to be prepared for trial. Even assuming a continuance would have been granted to allow Hunter to be evaluated by a medical expert, the trial court stated it would not have allowed expert testimony on whether Hunter’s confession was false and

that this was for the jury to decide. Therefore, Hunter has failed to demonstrate he was prejudiced by his counsel's failure to ask for a continuance to allow assessments to be conducted to determine whether Hunter's confession was false."

[¶15] The district court's findings are supported by the record. Under our standard of review, the court did not clearly err in finding Hunter failed to show a reasonable probability of a different outcome had trial counsel requested a continuance to more timely obtain expert testimony that his confession was false.

B

[¶16] Hunter argues the trial judge was biased against him as evidenced by the judge's adverse rulings. Hunter claims he was prejudiced by trial counsel's failure to move to disqualify the judge because of those rulings, and because of a reference to a newspaper article the judge might have read about the case. At trial, Hunter demanded a change of judge under N.D.C.C. § 29-15-21. The demand was rejected because more than 10 days passed since the start of the case and the judge already ruled on substantive matters. On post-conviction relief, the district court found "Hunter has failed to raise any valid instance or evidence of actual bias or lack of impartiality. As such, he has failed to show any prejudice for his counsel's failure to argue judicial disqualification under the North Dakota Code of Judicial Conduct." Again, under the standard of review, the district court's findings were not clearly erroneous.

C

[¶17] Hunter claims his trial counsel was ineffective because he did not request a continuance to investigate whether Hunter received Miranda warnings. The district court found "Hunter has failed to show how he was prejudiced by his counsel's failure to ask for a continuance to conduct further investigation on whether Hunter was Mirandized." The possibility of finding further evidence is not enough. *See Leavitt v. State*, 2017 ND 173, ¶ 16, 898 N.W.2d 435 (explaining defendant's assertion that calling an officer at trial "could have proved invaluable" fell short of *Strickland* requirements). Based

on the standard of review, we conclude the district court did not clearly err in finding Hunter failed to show he was prejudiced by counsel not requesting a continuance to further investigate facts surrounding when he was Mirandized.

IV

[¶18] The district court order denying post-conviction relief is affirmed.

[¶19] Gerald W. VandeWalle

Jerod E. Tufte

Lisa Fair McEvers

Daniel J. Crothers

Jon J. Jensen, C.J.