VERMONT SUPREME COURT
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Case No. 2020-186

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

OCTOBER TERM, 2021

In re Frederick Sheldon*	}	APPEALED FROM:
	}	Superior Court, Rutland Unit, Civil Division
	}	CASE NO. 293-6-17 Rdcv
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Petitioner appeals the order of the civil division denying his petition for post-conviction relief (PCR). We affirm.

Petitioner was charged with first-degree aggravated assault in September 2014 based on allegations that he assaulted his girlfriend, who was living with him at the time. He was convicted by a jury and received a sentence of three-to-twelve years' imprisonment. Petitioner was released on parole after three years. He filed this PCR action, asserting that his conviction should be vacated because his trial counsel rendered ineffective assistance.

In September 2019, the civil division held an evidentiary hearing, after which it issued an order denying petitioner's PCR claim. The court made the following findings in its order. The affidavit filed by the arresting police officer stated that in September 2014, the complainant reported to him that petitioner had assaulted her. The complainant stated that the altercation began when petitioner found a hotel key card and accused her of cheating. During the course of the fight, petitioner climbed on top of her, choked her, and banged her head against the floor. She tried to leave but petitioner dragged her back into the apartment. She was only able to calm him by laying down with him. Fearful for her safety, she waited three days before filing for an abuse prevention order and reporting the incident to police.

After taking her statement, the police officer went to petitioner's home. The officer approached the back of the building, following a stone pathway around the side of the building. At the back, there was a screen door through which the officer could see petitioner. The officer asked petitioner to step outside and petitioner complied. The officer then placed petitioner under arrest and escorted him to the police department for processing.

At the police department, the officer informed petitioner of his Miranda rights. Petitioner acknowledged his rights and agreed to talk to the officer about the incident. He agreed that he and the complainant had an altercation two days earlier. He said that she had initiated the fight by losing her temper and throwing things at him. He told the officer that the complainant had

bitten his finger and would not let go, so he grabbed her. The officer related the complainant's version of events to petitioner, and he responded that he could not believe that happened. The officer asked petitioner why he had strangled the complainant, and petitioner responded that all he knew was that she was biting his finger. Petitioner told the officer that they had both consumed a large amount of alcohol. The officer asked petitioner whether he denied choking the complainant, and he stated, "I don't know, sir, all I know, umm, I really don't remember." The officer asked if petitioner denied causing the complainant's injuries, and petitioner stated that he could not.

The trial took place in December 2014. The complainant, her drug-treatment provider, and the police officer testified consistently with the allegations in the affidavit. The officer testified about petitioner's post-arrest statements, including the fact that he did not deny choking the complainant. Petitioner also took the stand. He testified that the complainant drank a lot and was drinking on the day in question. She was angry and took a walk, and when she returned she was angry and started throwing things at him and biting his fingers. In response he pushed her against the wall. He could not recall what happened after that. He stated that he had no knowledge of strangling the complainant. At closing, trial counsel focused on petitioner's testimony that the complainant bit his finger. Counsel argued that any injuries the complainant sustained were an accidental consequence of petitioner trying to remove his finger and that he did not specifically intend to strangle her. The jury found petitioner guilty of aggravated assault.

In the PCR action, petitioner argued that trial counsel was ineffective because he failed to file a motion to suppress the statements petitioner made after his warrantless arrest, and because he failed to investigate whether the complainant's injuries could have been caused by her ex-boyfriend, with whom she had a tumultuous relationship. The PCR court concluded that the first claim failed because it was unlikely that a motion to suppress would have been granted. It reasoned that petitioner's arrest did not violate the Fourth Amendment and, under this Court's decision in State v. Libbey, 154 Vt. 646 (1990) (mem.), likely did not violate Article 11 of the Vermont Constitution. As to the second claim, the court was persuaded by the testimony of the State's expert that the failure to pursue a third-party defense did not fall below the standard of care.

On appeal, petitioner challenges the PCR court's ruling that trial counsel's failure to move to suppress his post-arrest statements did not constitute ineffective assistance. Petitioner contends that the officer violated Article 11 of the Vermont Constitution by arresting him within his home without a warrant and absent exigent circumstances. Accordingly, he argues, the inculpatory statements he made following his arrest should have been excluded.

When seeking to vacate a conviction based on ineffective assistance of counsel, a petitioner "must show by a preponderance of the evidence that counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms." In re Dunbar, 162 Vt. 209, 212 (1994). If the petitioner meets that burden, the petitioner must then show that he was prejudiced by the deficient performance "by demonstrating 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). This is a difficult standard to meet; defense attorneys have wide discretion in decisions regarding trial strategy and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. (quotation omitted). When reviewing a PCR decision, "[w]e will not disturb the decision of the trial court unless clearly erroneous." In re Miller, 168 Vt. 583, 584 (1998) (mem.).

We conclude that the PCR court's determination that counsel's performance did not fall below the objective standard of reasonableness is supported by the evidence. As the court found, trial counsel opted not to file a motion to suppress petitioner's statements because he did not believe he had a viable claim. The State's expert testified at the PCR hearing that there was compelling federal and state case law indicating that such a motion would not succeed. The court therefore did not err in concluding that trial counsel's decision not to pursue the motion under these circumstances fell within his broad discretion to make strategic decisions.

Counsel's decision not to file a motion to suppress was reasonable given the state of the record and existing case law. The U.S. Supreme Court has held for purposes of the Fourth Amendment that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of Payton [v. New York, 445 U.S. 573 (1980)]." New York v. Harris, 495 U.S. 14, 21 (1990). Thus, even assuming that petitioner was arrested in his home without a warrant, the statements would not be subject to exclusion under the Fourth Amendment.

Moreover, petitioner's claim that his warrantless arrest violated Article 11 would have been unlikely to succeed given the record in this case, and our analysis in State v. Libbey, a case involving facts very similar to this one. 154 Vt. at 646. In Libbey, two police officers who had probable cause to arrest the defendant for sexual assault on a child, drove to the defendant's house, parked their unmarked car in his driveway, and walked to the side door. The defendant saw the officers drive in and met them at a screen door on the porch of his residence. As he stood there, one of the officers, whom the defendant recognized as a police officer, asked him to step outside. When he complied, the officers informed the defendant of the charge and arrested him. The defendant moved to suppress statements he subsequently made at the police station, arguing that his arrest violated Article 11 of the Vermont Constitution. The trial court denied the motion.

We affirmed the denial of the motion to suppress. Id. We first noted that the defendant's statements would be admissible at trial under the Fourth Amendment even if he had been arrested inside his home, citing Harris. Id. We rejected the defendant's argument that Article 11 prohibited a warrantless arrest on the steps of his home absent exigent circumstances. We reasoned that Vermont Rule of Criminal Procedure 3(a) permits a law enforcement officer to arrest a person without a warrant if the officer has probable cause to believe that the person has committed a felony. Id. We further reasoned that there is a difference between a driveway, steps and a walkway to a home and other areas of the curtilage because, absent some indicia of privacy like a fence or gate, they 'serve[] as the normal access route for anyone visiting the premises.' " Id. (quoting State v. Ryea, 153 Vt. 451, 453 (1990)). Accordingly, we concluded that the arrest of defendant outside of his porch, an area within this implied license to approach, did not violate Article 11.

Petitioner argues that Libbey is distinguishable because he was behind a screen door inside his home, not on an enclosed porch, when the officer first approached. He claims that he was effectively placed under arrest within his home when the police officer asked him to step outside at a time when he was sitting at his kitchen table.

The question before us is not whether or how we should now distinguish this case from Libbey, but whether his counsel was ineffective for failing to make such an argument by filing a motion to suppress prior to trial. Petitioner's counsel had reviewed an affidavit in which the

arresting officer testified that he saw petitioner through the screen door and asked if he would step outside the residence, and petitioner agreed. Counsel could reasonably assess that the court was likely to credit this testimony. On this view of the facts, the case would be difficult to meaningfully distinguish from Libbey. See In re Kirby, 2012 VT 72, ¶ 13, 192 Vt. 640 ("Where the theory of law is untested or unsettled, counsel cannot be faulted for failing to raise every possible defense—this is both an unduly heavy and impractical burden."). We agree with the civil division that trial counsel was not ineffective for not pursuing a motion that would likely have been futile. See In re Miller, 168 Vt. at 585 ("Since the motion would not have been granted, we cannot find ineffective assistance of counsel based on the failure to file it.").

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice