Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-028

FEBRUARY TERM, 2009

In re Walter LeClaire	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Superior Court
	}	
	}	
	}	DOCKET NO. S0998-03 CnC
		Trial Judge: Matthew I. Katz

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

Petitioner appeals from a superior court judgment denying his petition for post-conviction relief. Petitioner contends the court erred in concluding that he failed to demonstrate prejudice from defense counsel's use of alcohol during trial. We affirm.

The facts underlying petitioner's conviction for second-degree murder are set forth in full in State v. LeClair, 2003 VT 4, and may be summarized as follows. The record evidence showed that, on March 3, 1999, a 911 call was made from petitioner's home reporting that a sixteen-month-old girl was not breathing. A CAT scan subsequently performed at the hospital revealed that the child had endured significant trauma to her brain with enough force to cause bleeding in several areas, dramatic retinal hemorrhages, and retinal detachment. A retinal specialist testified that he had examined thousands of eyes and had never seen a more dramatic example of injury consistent with a baby who had been shaken. Id. ¶ 2.

When defendant was interviewed at the hospital that day, he told police that his dog had knocked the child over and that she struck her head on a toolbox. The State's medical experts at trial unanimously refuted petitioner's claim as to how the injury occurred; one testified that the child's multiple injuries were consistent "with forces seen in moderate to high speed motor vehicle accidents" and were not consistent with a fall onto a toolbox. Id. ¶ 3. In denying petitioner's motion for judgment of acquittal, the trial court found that most of the experts had testified, and none disagreed, that the child's injuries were consistent only with "shaken infant" or "shaken impact" syndrome. Id. ¶ 4.

During an autopsy of the child, a blood sample was collected but a hair sample was not. Some months after the burial of the body, hairs were found on the toolbox. In response, petitioner moved for independent testing of hair samples of the child to compare with those

found on the toolbox. The court denied the motion as moot, noting that hair samples had not been preserved, although the State offered to test the child's blood as an alternative to hair. Petitioner subsequently moved to dismiss based on the State's failure to collect and preserve exculpatory evidence, which the court denied. Id. ¶¶ 5-7. Following a multi-day trial, the jury found petitioner guilty, and he was subsequently sentenced to life imprisonment. We affirmed the judgment on appeal, rejecting a number of contentions, including claims that the court erred in denying the motion to dismiss for failure to produce a sample of the victim's hair and in excluding evidence regarding the hair; denying a motion to suppress certain statements petitioner made to the police; and denying a request for a presentence investigation report. Id. ¶¶ 8-17.

Petitioner filed a pro se petition for post-conviction relief and, following the appointment of counsel, an amended petition alleging that his trial attorney was ineffective as a result of consuming alcohol during the trial, resulting—inter alia—in a failure to adequately prepare petitioner for his trial testimony. The court held an evidentiary hearing in which petitioner's sister-in-law and niece testified that they had smelled alcohol on trial counsel's breath during the trial, and that his behavior changed in the afternoon, when he appeared to be intoxicated. Petitioner, in contrast, testified that counsel appeared to be intoxicated in the mornings but more alert in the afternoons. Petitioner further testified that counsel had not informed him that he would testify at trial until moments before he was called, and did not prepare him for his trial testimony or cross-examination. Petitioner acknowledged at the hearing that he had lied to the police, to his attorney, and at trial about the cause of the victim's injuries, asserting that they had actually occurred earlier in a grocery store when he left his wife alone with the child for a few minutes. He further acknowledged that he had not informed his attorney during trial that he was lying, but would not have altered his story at trial or testified any differently had he spent more time preparing with counsel.

Trial counsel testified as well and denied that he was under the influence of alcohol at the trial. Counsel maintained that he had informed petitioner about the possibility of testifying at trial, carefully reviewed his testimony with him, and coached him on how to make the best impression on the jury. Counsel also described some of the work that he had performed in preparing for trial, which included consultations with two experts who corroborated the opinions of the State's experts on the cause of the victim's injuries, and the preparation of a video reenactment based on petitioner's version of the incident.

Following the hearing, the court issued a written decision, denying the petition. The court found that counsel was "frequently under the influence of alcohol" during the trial but rejected petitioner's claim that he had not adequately prepared for trial. The court further found that counsel "did prepare [petitioner] for testimony, even if perhaps insufficiently," although the court did not explain or make further findings on how the preparation was insufficient. Finally, the court determined that it "could find no prejudice based on inadequate testimony preparation because [petitioner] testified that he would have testified the same way even with more consultation from his lawyer." Accordingly, the court entered judgment for the State. This appeal followed.

Petitioner contends the court erred, asserting that he was not adequately prepared to testify as a result of counsel's alcohol consumption during trial, and was "severely prejudiced" thereby. The applicable standards are well settled. To be entitled to post-conviction relief, a

petitioner must demonstrate "that fundamental errors rendered his conviction defective." In re Grega, 2003 VT 77, ¶ 6 (mem.) (quotation omitted). A petitioner claiming ineffective assistance of counsel has the burden of showing, by a preponderance of the evidence, that: (1) his counsel's performance fell below the standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have resulted in a different outcome. In re Koveos, 2005 VT 28, ¶ 6 (mem.). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." In re LaBounty, 2005 VT 6, ¶ 7 (mem.) (quotation omitted). The trial court's findings in a post-conviction relief proceeding will not be disturbed if supported by credible evidence, nor its conclusions if reasonably supported by the findings. Koveos, 2005 VT 28, ¶ 6.

Assessed in light of these standards, we discern no basis to disturb the judgment. As numerous courts have recognized, evidence that defense counsel used drugs or alcohol or was intoxicated during trial does not establish ineffective assistance per se, but rather is relevant only insofar as it can be shown that it affected counsel's performance. See, e.g., Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) ("We agree with our sister circuits that, in order for an attorney's alcohol addiction to make his assistance constitutionally ineffective, there must be specific instances of deficient performance attributable to alcohol."); Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (evidence that counsel had alcohol on his breath during trial and later sought substance-abuse treatment was insufficient to show ineffective assistance absent showing of specific instances where counsel's performance was deficient); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (rejecting contention that attorney subsequently found to be incompetent to practice based on alcohol addiction established "rebuttable presumption" of ineffective assistance); Brimmer v. State, 29 S.W.3d 497, 510 (Tenn. Crim. App. 1998) (holding that, "consistent with the majority of jurisdictions," there must be a showing of prejudice before relief will be granted on the basis of alcohol abuse by defense counsel); see generally J. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Standard, 75 Neb. L. Rev. 425, 455 (1996) ("In cases where a criminal defendant's attorney has been impaired due to alcohol or drugs, the lower courts have uniformly applied the Strickland test to evaluate a claim of ineffective assistance of counsel and required the defendant to show prejudice.").

Petitioner's sole claim is that, as a result of his alcohol use, petitioner's attorney failed to adequately prepare petitioner for testimony at trial, and that petitioner was "severely prejudiced" as a result. Apart from this bare allegation, however, petitioner has not shown how the alleged deficiency was prejudicial. As the trial court here noted, petitioner acknowledged that his testimony would not have been different with more preparation, and consistent with that testimony petitioner has not made any proffer or argument on appeal as to how his testimony would have improved or differed with additional preparation. Accordingly, there is no basis to find any reasonable probability that the outcome would have been different absent counsel's alleged deficiency. See In re Fisher, 156 Vt. 448, 460-61 (1991) (rejecting claim that petitioner entered plea based upon inaccurate and ineffective advice of counsel where there was no claim or showing that but for counsel's errors he would not have pled guilty); see also Villafuerte v. Stewart, 111 F.3d 616, 632 (9th Cir. 1997) (rejecting claim of ineffective assistance where petitioner made no showing as to what lengthier trial preparation would have accomplished); Razor v. State, 576 S.E.2d 604, 608 (Ga. Ct. App. 2003) (finding no constitutionally ineffective assistance where petitioner failed to show how additional meetings with counsel to discuss the

case would have altered the outcome); Commonwealth v. Spotz, 896 A.2d 1191, 1226 (Pa. 2006) (rejecting ineffective-assistance claim where petitioner failed to show how additional preparation of witness would have improved his testimony or resulted in different outcome); State v. Classon, 935 P.2d 524, 532 (Utah Ct. App. 1997) (rejecting ineffective-assistance claim based upon allegedly inadequate preparation where defendants failed to demonstrate "any other possible testimony they may have been able to give, had they been better prepared"). The trial court thus correctly denied the petition.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice