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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-094

FEBRUARY TERM, 2009

In re Glenn Prior	}	APPEALED FROM:
	}	
	}	Windham Superior Court
	}	
	}	DOCKET NO. 152-3-07 Wmcv
	}	
	}	Trial Judge: David A. Howard

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

Petitioner challenges the trial court's denial of his petition for post-conviction relief (PCR). He argues that the court erred in rejecting his ineffective-assistance-of-counsel claim. We affirm.

The record indicates the following history. In January 2005, the family court issued a relief-from-abuse order, finding that petitioner abused his wife. Pursuant to condition six of the order, petitioner was prohibited from telephoning, writing to, emailing, or contacting his wife in any way, or attempting to communicate directly or indirectly with her through a third party or in any other manner. While the court could have checked a box indicating that this restriction also applied to petitioner's children, it did not do so. The order stated, however, that wife would have custody of the parties' two minor children, and condition twelve of the order directed that petitioner "shall have no contact with the minor children." The order further provided that there would be no contact until a temporary hearing could be scheduled in any divorce or custody action, and contact thereafter would be in accordance with family court orders in any such action.

In February 2005, petitioner was charged with multiple counts of violating this order. As relevant here, the State alleged that in late January 2005, petitioner went to the children's school and told school officials that he wanted to give the children lunch money. His request was denied in light of the relief-from-abuse order and the children's wishes. When informed that he could not deliver the money personally, petitioner refused an offer to leave the money with school officials and he departed. He indicated that he wanted to see the children himself. The State alleged that this conduct was an attempted violation of the no-contact provision in the relief-from-abuse order.

Petitioner hired attorney Hongisto to defend him. Hongisto believed that the no-contact provision in condition twelve of the order applied to the situation at issue. She argued at trial that petitioner had not attempted to have actual contact with the children, but rather, he had simply made an effort to leave money for the children. This argument was unavailing and petitioner was convicted of violating the relief-from-abuse order. His conviction was affirmed on appeal.

In August 2005, petitioner was again charged with violating the relief-from-abuse order, this time by sending letters to the children from prison through a third party. Attorney William Kraham was assigned to defend petitioner and succeeded in having the charges dismissed. Kraham argued that condition six prohibited petitioner only from contacting wife by telephone and mail, not the children, and that condition twelve addressed only formal parent-child contact or "visitation" and not general contact. He noted that petitioner was not found to have abused, or to pose a danger to, the children. Additionally, he pointed out that, at the time of the charged incident, the family court had allowed parent-child contact by mail under an express agreement between mother and petitioner. The trial court credited Kraham's arguments and it granted the motion to dismiss. The State did not appeal from this decision.

Petitioner then filed a PCR petition in the instant case, arguing that attorney Hongisto was ineffective because she failed to file a similar motion to dismiss in the first case. Kraham testified on petitioner's behalf at trial. He asserted that any competent attorney should have identified the same issue and should have moved to dismiss the charge. He maintained that had such a motion been filed, it would have produced a different result—dismissal—given the outcome in his case. Attorney Stephen Fine testified as an expert for the State. He opined that Hongisto had not acted unreasonably or incompetently by failing to recognize the issue cited by Kraham. He stated that the no-contact language in condition twelve was plain and absolute, and that the trial court's failure to indicate that condition six applied to the children did not reduce the force or clarity of condition twelve. The attorneys disagreed over whether another trial judge would necessarily credit Kraham's interpretation of the relief-from-abuse order.

In light of these and other findings, the trial court concluded that while Kraham had made a creative, and ultimately successful argument, Hongisto's failure to raise a similar argument did not demonstrate that she was incompetent. Although the family court had not checked condition six as applying to the children, condition twelve unreservedly prohibited petitioner from contact with the children. There was no language in this condition to suggest that an exception existed for casual contact or contact by mail. The order similarly did not distinguish between "parent-child visitation" and "contact," as petitioner suggested; indeed, it did not use the word visitation at all. The court concluded that Hongisto's interpretation of the order was not so irrational or lacking in legal analysis as to meet the ineffective-assistance-of-counsel standard.

Indeed, the court noted, all of the attorneys had agreed at trial that they would not advise a client to ignore such a prohibition in a relief-from-abuse order if they were consulted before the person acted. This demonstrated to the court that the legal issue was not so clear-cut as to render Hongisto ineffective for failing to raise it, either before trial or in a motion for judgment of acquittal. Moreover, the court added, Hongisto's behavior was even more reasonable given that in her case, petitioner had actually tried to see and speak to the children, unlike in Kraham's case, which involved letter writing. Finally, the court also noted that even if attorney Hongisto

had raised this argument, dismissal was not necessarily likely. While the trial judge in one case found the distinction raised by Kraham meaningful and applicable to the letter writing at issue, the court could not say with any certainty that another judge would have ruled the same on the distinct facts of Hongisto's case and the straightforward language of condition twelve. For these reasons, the court denied the petition for post-conviction relief. This appeal followed.

Petitioner argues that the court erred in reaching its conclusion, contending that the court's interpretation of the underlying relief-from-abuse order was oversimplified. He reiterates that condition six of the order did not extend to his interactions with the children, and that condition twelve prohibited him only from having "visitation" with the children. According to petitioner, he did not violate the terms of the order by going to the children's school, and there was a reasonable possibility that the charge against him would have been dismissed had Hongisto raised the same argument as Kraham.

We find these arguments unpersuasive. Petitioner had the burden at trial of showing "by a preponderance of the evidence that: (1) his counsel's performance fell below an objective 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, 178 Vt. 485 (mem.) (quotation omitted). "In looking at the evidence, we are not permitted to use hindsight to evaluate counsel's conduct; rather, we must look to whether such decisions were within the range of competence demanded of attorneys in a criminal case at that time." In re Washington, 2003 VT 98, ¶ 8, 176 Vt. 529 (mem.) (quotation omitted). We will uphold the trial court's findings of fact unless they are clearly erroneous, and we must affirm the trial court's conclusions if they follow from the findings. Id.

In this case, as set forth above, the trial court weighed the competing arguments presented by the parties, and it found the State's position more persuasive. The State's expert testified that Hongisto's performance did not fall below accepted norms. The court agreed, pointing to the plain language of condition twelve. As it explained, it was not irrational for Hongisto to interpret the order in the way she did, and in fact, all of the attorneys testified at trial that they would not advise a client to have contact with a child in the face of such a prohibition. While petitioner argues that the no-contact provision related only to parent-child contact, the trial court concluded that a competent attorney could read the order differently. It found nothing in the language of the order to suggest that only "visitation," as opposed to "contact" was prohibited. This conclusion is consistent with the plain language of the relief-from-abuse order. Although Hongisto could have raised an argument similar to Kraham's, the record supports the court's conclusion that she was not incompetent for failing to do so.

Essentially, petitioner seeks to have this Court reweigh the evidence. This we will not do. It is the role of the trial court, not this Court, to determine the weight of evidence, the credibility of witnesses, and the persuasive effect of testimony. In re Calderon, 2003 VT 94, ¶ 13, 176 Vt. 532 (mem.) (citing State v. Hagen, 151 Vt. 64, 65 (1989)). Because the court's findings are supported by the record, and the findings in turn support the court's conclusions, they must stand on appeal.

Given that petitioner failed to demonstrate that Hongisto's performance fell below accepted norms, we need not address whether there was a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have had a different outcome.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice