ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-044

NOVEMBER TERM, 2009

In re Daniel Valentine	APPEALED FROM:
	Chittenden Superior Court
	DOCKET NO. S0058-05 CnC
	Trial Judge: Helen M. Toor

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

Petitioner appeals from the 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. Petitioner was charged with attempted second-degree murder after he brutally attacked his former girlfriend. Defendant maintained that he was mentally ill at the time of the assault. A court-appointed psychiatrist, Dr. Jonathan Weker, opined that petitioner suffered from post-traumatic stress disorder (PTSD) due to childhood abuse and that he was in the middle of a disassociative flashback at the time of the offense, triggered by a feature of the victim's face that reminded him of his abusive aunt. Dr. Paul Cotton, who conducted an independent psychiatric evaluation of petitioner for the State, disagreed. He opined that petitioner suffered from antisocial personality disorder and polysubstance abuse, and that he was not insane at the time of the offense.

At trial, the victim testified that she ended her relationship with petitioner because he threatened and abused her. The victim obtained a temporary relief-from-abuse order against petitioner, but notwithstanding this order, she allowed petitioner to stay at her apartment for several days. Just before the assault, petitioner accused the victim of being interested in other men. After the victim told him that she no longer loved him, petitioner attacked her, stating that he was going to kill her and that if he couldn't love her, no one would. Following the victim's direct testimony, petitioner decided to plead guilty. The State did not offer a plea deal or sign the plea agreement form, but the judge, petitioner, and petitioner's counsel signed a plea agreement form providing a sentence of 18-36 years minimum and 23-55 years maximum and waiving petitioner's right to appeal. Following a sentencing hearing, the court imposed the maximum sentence. It found that the victim was helpless during the assault and that the attack was particularly brutal. It considered petitioner's PTSD theory, but concluded that petitioner attacked the victim, not because he thought she was his abusive aunt, but because he could no longer control her. The court considered defendant's childhood abuse a mitigating factor, but it found this factor outweighed by the aggravating factors. Petitioner moved for sentence reconsideration,

which the court denied. We affirmed its decision on appeal. See State v. Valentine, No. 2004-011, 2004 WL 5582077 (unreported mem.).

Petitioner then filed a PCR petition, alleging in relevant part that he received ineffective assistance of counsel because counsel failed to timely obtain a crucial piece of evidence supporting his claim that he suffered from PTSD. Petitioner stated that he told counsel that he had been diagnosed with PTSD in connection with an application for Social Security benefits (SSI) around 1994 while staying at a residential facility in Massachusetts. Although petitioner's trial attorneys requested this information prior to trial, the 1994 Social Security application did not arrive until after sentence was imposed. Petitioner maintained that his attorneys acted incompetently in not obtaining this document sooner, arguing that this evidence would have bolstered Dr. Weker's opinion that he suffered from PTSD and led the court to consider his mental illness as a mitigating factor at sentencing.

Following a hearing, the court denied the petition. The court explained that the document at issue was a three-page form filled out by Dr. William Kantar in April 1994, which had been submitted to the Social Security Administration for purposes of obtaining SSI benefits for petitioner based on a psychiatric disorder. Dr. Kantar indicated on the form that petitioner was preoccupied by the murder of his mother, which occurred when petitioner was four years old, and that petitioner was subject to flashbacks and loss of concentration. The form listed petitioner's diagnoses as PTSD and depression, and noted that Dr. Kantar had seen petitioner "once every 4-6 weeks for a few minutes." Dr. Kantar also testified at the PCR hearing, as did Drs. Cotton and Weker.

Attorney Ernest "Bud" Allen testified as a legal expert for petitioner. Allen opined that he would have tried to obtain all of petitioner's medical records, and he noted that many such records were in fact collected in this case. He also noted that unless petitioner expressly mentioned being diagnosed with PTSD, there would have been no reason to think anything had been overlooked because the records collected covered "most of [petitioner's] life." Allen believed that if counsel knew that petitioner received SSI benefits due to PTSD, counsel should have pushed hard to get those records prior to sentencing. He did not think that the lack of records affected the trial phase because they were not directly relevant to petitioner's decision to plead guilty. Allen did not testify as to exactly what he would have done to get the records from SSI, nor was he aware of what defense counsel had or had not done in that regard. He merely stated that if defense counsel "knew of the prior PTSD diagnosis and the existence of a record and he didn't pursue it, that would not be due diligence."

The court found that petitioner's trial counsel was one of the best criminal defense attorneys in the state, and that there was no evidence that he cut corners or overlooked any important steps in preparing for trial. Counsel obtained ten years of records from the Massachusetts child-protection agency, as well as various treatment providers and residential facilities, beginning when petitioner was ten years old. These records included reference to what could be considered disassociative blackouts, and counsel also had witnesses to testify that petitioner had experienced flashbacks. Counsel had a caseworker from Massachusetts who was prepared to testify that he recalled petitioner being diagnosed with PTSD, as well as extensive records showing petitioner's past history of abuse. Additionally, as reflected above, counsel had his paralegal seek records from the Social Security Administration before trial. As noted above,

petitioner decided to plead guilty midway through trial because he did not want to further traumatize the victim.

Based on these and numerous other findings, the court concluded that petitioner failed to show that his attorneys' performance fell below an objective standard of performance informed by prevailing professional norms. It explained that although counsel did not obtain the Kantar memo until after trial, he had sought to obtain it before trial, and he sought a continuance in part because he did not have it. While counsel could have taken further steps to try to obtain this document, the court found nothing to suggest that counsel had reason to expect that this document alone would have been crucial to the defense. It agreed with the State that one would not necessarily expect the Social Security Administration to have medical records that did not already exist in a medical provider's office. None of petitioner's records reflected a PTSD diagnosis, moreover, and other than petitioner's statement about a diagnosis to counsel, there was nothing in petitioner's records that made it likely such a diagnosis would be located. The court also observed that attorney Allen had not expressed any opinion as to whether counsel's attempts to obtain the SSI information were sufficient. On these facts, the court reasoned, it could not find that the failure to take additional steps to obtain the SSI records was ineffective assistance of counsel. The court also concluded that petitioner did not suffer any prejudice due to counsel's allegedly deficient performance. For these and other reasons, the court denied the petition. This appeal followed.

As reflected above, to sustain his claim of ineffective assistance of counsel, petitioner needed to demonstrate that: (1) "counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms;" and (2) "counsel's deficient performance prejudiced the defense." In re Washington, 2003 VT 98, ¶ 8, 176 Vt. 529 (quotation omitted). A defendant can prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In re Dunbar, 162 Vt. 209, 212 (1994). On appeal, we review the trial court's findings of fact for clear error; we will affirm the court's conclusions if they follow from its findings. Id. at 211.

We begin with petitioner's assertion that counsel's failure to timely obtain the "Kantar diagnosis" contained in petitioner's SSI application fell below the standard of practice. Petitioner does not challenge any of the court's findings as clearly erroneous. Instead, he simply reiterates his assertion that trial counsel's pretrial investigation was inadequate.

As reflected above, the trial court concluded otherwise, and its decision is well-supported by its findings. The court recognized that criminal defense attorneys have "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." United States v. Strickland, 466 U.S. 668, 691 (1984). It found that trial counsel satisfied that duty here. We need not repeat all of the court's findings here. As stated above, counsel gathered extensive records about petitioner, and the court concluded that counsel acted reasonably in his attempts to obtain the SSI document as well. Indeed, as the court observed, petitioner's legal expert did not testify that counsel's actions were inadequate. Petitioner simply reargues his case below, asking this Court to reweigh the evidence and reach a different conclusion. This we will not do. It is for the fact-finder to evaluate the credibility of witnesses and weigh the evidence. In re Grega, 2003 VT 77, ¶ 8, 175 Vt. 631. Where, as here, the court's

findings are supported by the record, and the court's findings support its conclusion, the court's decision must stand on appeal. Given our conclusion, we need not address petitioner's assertion that he was prejudiced by counsel's actions. In re Cohen, 161 Vt. 432, 435 (1994).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice