

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-015

AUGUST TERM, 2006

In re James Hicks

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APPEALED FROM:

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Orleans Superior Court

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DOCKET NO. 83-5-98 Oscv

Trial Judge: Dennis R. Pearson

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

Petitioner appeals the superior court=s decision denying post-conviction relief. We affirm.

In 1995, petitioner was charged with sexually assaulting his two minor stepdaughters. Petitioner hired a private attorney to defend him against these charges. At trial, petitioner pursued a defense that the abuse never occurred, relying on the testimony of a physician who examined the two girls and found no evidence of sexual abuse. The State presented the testimony of the two girls and an expert witness. The expert witness, a

psychologist, gave her opinion as to why the girls may have waited so long to report the sexual abuse and why they may have initially denied that they were abused. Petitioner=s attorney did not object to this testimony and did not call an expert to rebut it. Petitioner=s attorney did cross-examine the State=s expert. The jury convicted petitioner of two counts of sexual assault on a minor and one count of prohibited acts.

Petitioner sought post-conviction relief. At a two-day trial held in May of 2005, the superior court heard testimony from petitioner=s trial attorney, two legal experts, and two psychological experts. The superior court concluded that the trial attorney=s performance did not fall below prevailing norms, and even if it had, insufficient prejudice had resulted to warrant a new trial. See Strickland v. Washington, 466 U.S. 668, 690B92 (1984) (holding that party claiming ineffective assistance of counsel must show both sub-standard performance and resulting prejudice); see also In re Pernicka, 147 Vt. 180, 182B84 (1986) (adopting Strickland test for ineffective assistance of counsel). Specifically, the superior court concluded that, in light of the strength of the girls= testimony, the fact that medical evidence did not eliminate the possibility of an assault, and the absence of any alibi defense, any error by petitioner=s attorney did not undermine confidence in the guilty verdict. The court denied the petition, and petitioner now appeals from that denial.

Petitioner asserts that the superior court erred in concluding that no prejudice resulted from his attorney=s performance.* Specifically, petitioner argues that the State=s expert directly attacked petitioner=s defense that the abuse did not occur, and that his attorney=s failure to counter this attack necessarily prejudiced the outcome of the case. In support of this argument, petitioner points to the fact that the girls= testimony was specific in some respects but vague in others, particularly the dates of the abuse. In addition, one of the girls originally denied that petitioner had abused her. The State=s expert sought to explain these irregularities in the girls= testimony, such that a counter-expert would have had an impact.

AThe findings in a post-conviction relief proceeding will not be disturbed unless they involve clear error, and in the case of conflicting evidence, we will defer to the trial court=s judgment.@ In re LaBounty, 2005 VT 6, &7, 177 Vt. 635. While the evidence at the PCR trial was mixed, there was credible evidence supporting the superior court=s findings and conclusions.

The legal and psychological experts at the PCR trial disagreed about the reasonableness of petitioner=s attorney=s representation and whether his decision not to rebut the State=s expert had an impact on the outcome of the trial. Petitioner=s attorney testified that he did not consider the State=s expert=s testimony particularly damaging because it was generic and did not relate to the primary defense: that petitioner was not at the house at the critical times and that there was no corroborating physical evidence. Petitioner=s expert testified that the State=s expert helped explain the chronology of the girls= testimony and was prejudicial for that reason. The State presented expert testimony at the PCR trial that petitioner=s attorney had neutralized the effect of the State=s expert at the criminal trial through effective cross-examination. Further, the State emphasized that the girls themselves had explained why they had delayed reporting the abuse (because they were afraid of petitioner), so that the psychological expert=s testimony did not greatly enhance the point.

In its twenty-five-page written decision, the superior court devotes some seventeen pages to the evidence supporting its factual findings. This includes a detailed examination of the evidence and trial tactics at the underlying criminal trial, as well as a careful weighing of the evidence presented at the PCR trial. The court recognizes the evidence tending to support and tending to defeat petitioner=s claim of ineffective assistance. Petitioner does not claim that any of the superior court=s findings were clearly erroneous or were unsupported by credible evidence, but asks us to reassess the evidence which the superior court has already evaluated. We decline to do so.

Petitioner has not demonstrated that the superior court committed clear error in denying post-conviction

relief.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

* Petitioner also contests the superior court's conclusion that his attorney's performance was not substandard. Because we affirm the trial court's conclusion that no prejudice resulted even if substandard performance is assumed, there is no need to address the issue.