

STATE OF INDIANA
COUNTY OF LAPORTE

IN THE LAPORTE SUPERIOR COURT NO. 1
ANNUAL TERM

JOHN BRENNAN LARKIN,

Petitioner,

Vs.

CAUSE NO. 46D01-2201-PC-000002

STATE OF INDIANA,

Respondent.

ORDER

The Petitioner, John Brennan Larkin, filed a Petition for Post-Conviction Relief. The State filed an Answer that denied the allegations in the petition. A Special Judge was appointed. A hearing was held. The parties presented evidence and arguments. The Special Judge took the matter under advisement to review the evidence, the pleadings, the Petitioner's Memorandum of Law, all of the PCR exhibits, the Opinion of the Indiana Court of Appeals, the Opinion of the Indiana Supreme Court, and all applicable law.

The Court has reviewed all of the above and is now duly advised. The Petition for Post-Conviction Relief should be denied for all of the reasons set forth below.

FINDINGS OF FACT

THE CRIMINAL CASE / JURY TRIAL

Inasmuch as this case has been litigated and reviewed for more than ten (10) years, this Court declines to expound further on the facts that have already been found and placed into the record, from the filing of the Criminal Information, through the jury trial and the exhaustion of all appeals. Both the Opinions of the Indiana Supreme Court Case No. 21S-CR-427 and Indiana Court of Appeals No. 19A-CR-2705 contain Facts and Procedural History that this Court accepts as sufficient for this PCR, with respect to those events.

THE PCR EVIDENTIARY HEARING

The Petitioner in his PCR raises one legal issue: ineffective assistance of counsel, which is based solely upon the guilty verdict at trial for an uncharged, lesser included offense, Involuntary Manslaughter. Prior to closing arguments, the trial court granted the State's request to instruct the jury on the lesser included offense, which was the only charge upon which the petitioner was convicted. The petitioner challenged the conviction, and it was reversed by the Court of Appeals, but subsequently reinstated by the Indiana Supreme Court. The evidence at the PCR hearing consisted of the Petitioner's two trial attorneys testifying that they

failed to dedicate adequate time in preparation for trial to defend their client to an uncharged crime. The evidence showed that near the end of the jury trial, the State requested that the court instruct the jury on a lesser included offense of Involuntary Manslaughter. Over the objection of the defense, the trial court granted the State's request. The jury acquitted the Petitioner of the Voluntary Manslaughter charge, but convicted him of the lesser included offense of Involuntary Manslaughter. It is unclear to this court how any amount of preparation could have resulted in a different outcome. No evidence was presented at the PCR hearing that provided such clarification. Self-defense to the charge of Voluntary Manslaughter was the trial strategy. Would they have simultaneously offered to the jury an alternate theory of defense to the uncharged crime of Involuntary Manslaughter? What would have been the effect upon the jury if the defense had employed an alternate trial strategy, and the jury perceived that to weaken the strength of the defense? Might the jury have determined that a shotgun defense was less than credible, and therefore have convicted the defendant of Voluntary Manslaughter? We just don't know.

Nevertheless, as the fact finder at the PCR hearing, this court finds that the opinion testimony of the two witnesses is not credible concerning their own alleged ineffectiveness, it is not genuinely believed by either attorney, and is simply their final attempt to be loyal to their client to the end, as this legal marathon now draws to a close.

THE PCR EVIDENCE

1. The Petitioner was represented at trial by two privately retained attorneys, Stacy Uliana and Dorothy Ann Maryan, both with law offices in Bagersville, Indiana.
2. Each attorney has practiced law for over twenty (20) years: Uliana since 1997, and Maryan since 2000.
3. During their legal careers, both attorneys have specialized in criminal defense.
4. Attorney Uliana has extensive legal experience in criminal law, including the following:
 - (A) She previously served as defense attorney in approximately thirteen (13) jury trials.
 - (B) Previous to representing the Petitioner at trial on the charge of Voluntary Manslaughter, she had defended a client at jury trial charged with Voluntary Manslaughter.
 - (C) She has been employed as a law professor.
 - (D) She was employed at the Indiana Public Defender Council. While serving in that capacity, her knowledge of Indiana criminal law was deemed to be sufficient for her to be trusted with the responsibility of

writing legal handbooks to assist those serving as Indiana Public Defenders.

5. Attorney Maryan has extensive legal experience in criminal law, including the following:
 - (A) She previously served as defense attorney in approximately fifteen (15) jury trials.
 - (B) Previous to representing the Petitioner at trial on the charge of Voluntary Manslaughter, she had defended a client at jury trial charged with Voluntary Manslaughter.
6. Although the Petitioner could have retained the services of thousands of attorneys who practice law in a closer proximity to the Courthouse where his Voluntary Manslaughter case was to be tried, he selected and retained the legal services of these two attorneys to represent him. The court takes judicial notice that Bagersville, IN, is nearly two hundred (200) miles from the La Porte Superior Court, requiring approximately six (6) hours for one to make the round trip via ground transportation.
7. The Petitioner obviously selected two (2) attorneys who were highly-skilled, very experienced, and well-respected to defend him on the charge of Voluntary Manslaughter. The Petitioner demanded that his legal counsel possess the highest level of professional skills to defend him on a charge that

could send him to prison for decades, and he did not allow either the practical logistics or the high costs of such legal representation to prevent him from securing the level of legal competence that he got with attorneys Uliana and Maryan.

8. When objectively evaluating the comprehensive legal skills and experience that the two (2) attorneys possessed, compared to the legal skills and experience of the average attorney defending clients at a jury trial in Indiana, the petitioner was extremely fortunate to have such trial counsel.
9. Far more hours were invested in discovery and depositions than the average criminal defense attorney has available to spend prior to jury trial.
10. Far more hours were invested in legal research into evidentiary issues, including lesser included offenses, than the average criminal defense attorney has available to spend prior to jury trial.
11. Objectively, the Petitioner was represented at jury trial by two (2) of the best prepared, experienced, skilled, and effective attorneys that he could have privately retained in the state of Indiana.
12. The Petitioner went to trial on one (1) count of Voluntary Manslaughter, a Class A Felony, carrying a range of incarceration between twenty (20) and fifty (50) years.

13. The State of Indiana was represented by Special Prosecuting Attorney Stan Levco, an experienced prosecutor, with several decades of jury trials.
14. The trial lasted five (5) days.
15. The Defense called expert witnesses to testify during the Defense Case-In-Chief.
16. The level of skill and effectiveness of attorney Stacy Uliana is exhibited in the transcript of the Defendant's Opening Statement. Exhibit A
17. The level of skill and effectiveness of attorney Dorothy Maryan is exhibited in the transcript of the Defendant's Closing Argument. Exhibit D
18. The level of skill and effectiveness of attorneys Uliana and Maryan is exhibited in the Defendant's Post-Trial Motion to Vacate Verdict. Exhibit K
19. The level of skill and effectiveness of attorneys Uliana and Maryan was exceptional, inasmuch as they obtained an acquittal for the Petitioner on the charge of Voluntary Manslaughter, a Class A Felony.
20. The Petitioner was convicted of Involuntary Manslaughter.
21. Attorney Uliana represented the Petitioner as appellate counsel in front of the Indiana Court of Appeals.
22. The level of skill and effectiveness of attorney Uliana was exceptional, once again, as a unanimous Court of Appeals was persuaded by

her arguments, reversed the trial court, and acquitted the Petitioner on the lesser included charge of Involuntary Manslaughter.

23. In fact, the Court of Appeals commended attorney Uliana in footnote 1, “We thank counsel for their well-prepared and engaging oral advocacy.”

24. After the Court of Appeals decision, the Petitioner had been completely exonerated of all criminal liability. At that point, nobody was suggesting that the Petitioner’s counsel were ineffective. In fact, the only conclusion that one could reach was that the Petitioner’s counsel were unequivocally effective. There is no better method of determining the effectiveness of counsel for a criminal defendant than an acquittal of all criminal charges.

25. However, the Indiana Supreme Court granted transfer and affirmed the judgment of the trial court.

CONCLUSIONS OF LAW

1. Two Part Test

Claims of ineffective assistance of trial counsel are evaluated under a two-part test.

A petitioner must demonstrate that his counsel performed (1) deficiently, and (2) it resulted in prejudice. *Cole v. State*, 61 N.E. 3d 384, 387.

The U.S. Supreme Court, in *Strickland v. Washington*, 466 U.S. 668, addressed a claim of ineffective assistance of counsel and issued an opinion containing the legal analysis courts should apply to such claims. It is helpful to consider the actual words contained in the opinion by Justice O'Connor.

[A] Right to Counsel / 6th Amendment

"...this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, ..." (Page 684)

[B] Adversarial System / Fundamental Fairness

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." (Page 685)

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Page 686)

"...the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case

the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” (Page 696)

[C] Serious Deficiency / At the Time / Not in Hindsight

“... the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.” (Page 687)

“Judicial scrutiny of counsel’s performance must be highly deferential.” (Page 689)

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” (Page 689)

“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” (Page 688)

APPLICATION OF LAW TO THE FACTS

The Petitioner's claim of ineffectiveness of counsel is meritless

The Petitioner has failed to make out a prima facie case of either substantial deficiency or possible prejudice.

I. INEFFECTIVENESS CLAIM FAILS

The Petitioner ignores the factors that Strickland and other courts have considered when evaluating a claim of ineffectiveness. Instead, he suggests to this court that a different standard be used. He argues, in effect, that any legal representation short of perfection and an acquittal on all criminal charges is ineffective, per se. He ignores the fact that after a five (5) day trial the jury returned a verdict of not guilty to the Voluntary Manslaughter charge. However, when evaluating a claim of ineffectiveness, this court is required to consider the totality of the circumstances, which includes the effectiveness of counsel that were able to secure an acquittal to the most serious charge given to the jury.

This court finds that the counsel for the petitioner were not ineffective, determined objectively, considering the totality of the circumstances,

before and during the jury trial. The court has considered the following when making this determination:

[A] The petitioner privately retained two (2) attorneys whom would be required to travel a significant distance to the jurisdiction of his criminal case and jury trial. Neither logistics nor costs restricted his choice of the two (2) attorneys who he decided could provide the most expert representation that he could obtain. Most criminal defendants have one (1) public defender who often practices law in close proximity to the courthouse where the case will be tried.

[B] Each of the petitioner's attorneys has practiced criminal law for over twenty (20) years. Most criminal defendants have public defenders with less criminal law experience.

[C] Attorney Uliana has been trusted to serve as a law professor and to write manuals for the Indiana Public Defender Council. Both attorneys have represented criminal defendants in numerous felony jury trials. Most criminal defendants are represented by an attorney without such expertise.

[D] The petitioner's attorneys were able to devote significant time in pretrial discovery, including taking numerous depositions, all of which requires far more time and money than that available to most attorneys representing criminal defendants.

[E] The petitioner's attorneys were able to invest far more time into pretrial legal research than that available to busy public defenders with heavy caseloads.

[F] The petitioner's attorneys pretrial preparation and trial presentation were exceptional, which is exemplified by securing an acquittal on the Voluntary Manslaughter charge.

[G] Even though the trial court allowed the jury to consider a lesser included offense of Involuntary Manslaughter, upon which the State was able to obtain a conviction, attorney Uliana represented the petitioner in front of the Indiana Court of Appeals. She was commended by her representation of the petitioner, and the Court of Appeals agreed with her arguments and reversed the trial court, resulting in an acquittal of the only conviction the State had obtained.

The evidence is overwhelming that the petitioner's counsel were not ineffective, and the petitioner has failed to meet his burden.

II. PREJUDICE CLAIM FAILS

The petitioner has failed to meet his burden on this issue. Even if one accepts the petitioner's argument that his attorneys erred by not anticipating and spending more pretrial time preparing for an uncharged

crime, with the possibility that it might be given to the jury as a lesser included offense, it is simply impossible to conclude that resulted in prejudice. However, it is easier to speculate that if the petitioner's attorneys had actually done as he, in hindsight, suggests that they should have done, the result could have been much worse. Here's why:

[A] How much time does the petitioner suggest his attorneys should have spent preparing a defense, legal research, and arguments for an uncharged crime that might be determined to be a lesser included offense? What if that preparation strategy reduced their time preparing to defend the petitioner on Voluntary Manslaughter, and then he got convicted of Voluntary Manslaughter? Clearly, the petitioner would now be arguing that they were ineffective because they spent too much time preparing for an uncharged crime.

[B] What if the lesser included offense of Involuntary Manslaughter had not been given to the jury? Obviously, the petitioner simply assumes that the jury would have found him not guilty of the Voluntary Manslaughter. But what is that assumption based upon? Nobody, except the jurors, knows what happened during jury deliberations. One could likely make a stronger argument that it was the lesser included offense that saved the petitioner from a conviction on Voluntary Manslaughter. Perhaps the

jurors compromised their positions to reach unanimity on the lesser included offense. Had it not been an option, the jury would have had to make the hard decision on the only charge under consideration. The petitioner ignores the reality that juries often find it easier to reach a verdict on a lesser included offense, one which they perceive will not have as devastating effect on the life of the defendant. Inasmuch as jury deliberations are not a matter of record, we simply don't know what their verdict would have been on the Voluntary Manslaughter charge had it been the only charge upon which they could have rendered a verdict. It is certainly logical and reasonable to conclude that the lesser included offense saved the petitioner from a conviction on the greater.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED
that the Petition for Post-Conviction Relief is DENIED.



Kim Hall, Special Judge
LaPorte Superior Court No. 1

SO ORDERED: 4/25/2023