

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37492

QUINCY JEROME MAYES,)	2011 Unpublished Opinion No. 642
)	
Petitioner-Appellant,)	Filed: September 30, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order denying application for post-conviction relief, after evidentiary hearing, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant. Diane M. Walker argued.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent. Mark W. Olson argued.

WALTERS, Judge Pro Tem

Quincy Jerome Mayes appeals from the district court’s order denying post-conviction relief. We affirm.

I.

FACTS AND PROCEDURE

Mayes was charged with two felony counts of trafficking in cocaine and one felony count of possession of marijuana. He was convicted on all counts following a jury trial and was sentenced to terms of imprisonment.

Thereafter, Mayes filed a post-conviction petition asserting a number of claims of ineffective assistance of counsel. Following a court trial, the district court denied relief, finding a lack of deficient performance by counsel or prejudice to Mayes. Mayes appeals.

II. ANALYSIS

On appeal, Mayes alleges that his attorney was ineffective for failing to “investigate” and present the testimony of Rickie Oliver in Mayes’s trial defense on one of the trafficking counts. A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Curless v. State*, 146 Idaho 95, 98, 190 P.3d 914, 917 (Ct. App. 2008). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). Determining whether an attorney’s pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney’s investigation. *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990). To prevail on a claim that counsel’s performance was deficient in failing to interview witnesses, a defendant must establish that the inadequacies complained of would have made a difference in the outcome. *Id.* at 111, 785 P.2d at 675. It is not sufficient merely to allege that counsel may have discovered a weakness in the State’s case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation. *Id.*

When reviewing a district court’s decision to grant or deny a petition for post-conviction relief following an evidentiary hearing, this Court will not disturb the district court’s factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Murray*, 121 Idaho at 921, 828 P.2d at

1326. A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Strickland*, 466 U.S. at 698. When faced with a mixed question of fact and law, the Court will defer to the district court's factual findings if supported by substantial evidence, but will exercise free review over the application of the relevant law to those facts. *Murray*, 121 Idaho at 921-22, 828 P.2d at 1326-27.

On the charge in question, Mayes was alleged to have possessed one pound of cocaine. An undercover agent arranged a controlled buy of the cocaine from Oliver and a number of officers were involved in surveillance of Oliver and Mayes. Officers watching Mayes observed him leave his house with a silver shopping bag and drive to the scene of the buy where he gave the bag to Oliver. Mayes went into a nearby restaurant to wait. Oliver then delivered the bag, which contained one pound of cocaine, to the undercover officer and collected \$12,000 in marked bills in payment. Oliver then met with Mayes again and gave him \$11,000 of the marked bills, retaining \$1,000 of the money for himself. Mayes left in his vehicle alone and, when the police tried to stop him, Mayes tried to evade capture, attempting to drive around police cars blocking his path by driving onto a lawn and sidewalk. Mayes's escape attempt was unsuccessful and he was stopped and arrested. The \$11,000 buy money was recovered from Mayes's person. A search warrant for Mayes's home was obtained and the police found in a locked safe an additional fifty-one grams of cocaine and an additional \$12,000. Elsewhere in the home the police found in excess of three ounces of marijuana, packing materials and digital scales commonly used to weigh drugs for packaging and sale.

Oliver was also charged with criminal offenses for delivery of the one pound of cocaine and other unspecified drug delivery charges, which charges also involved Mayes as the suspected deliveryman and supplier of the drugs. Mayes and Oliver were tried separately, with Mayes being tried first. Oliver was also convicted and sentenced to terms of imprisonment.

At the post-conviction trial, Oliver testified that Mayes was an unwitting participant in his delivery of the one pound of cocaine. Specifically, Oliver said that he knew Mayes and that Mayes allowed him free access to his home on occasion. He said that the one pound of cocaine was his and only his and after he arranged the deal with the undercover officer he went to Mayes's home to package the drugs. Oliver said that he did so because the police were often in his apartment building as it was located next to the Ada County Courthouse and he was concerned that a drug dog would alert on his apartment. Oliver testified that he left the drug

package in a shopping bag in a cupboard in Mayes's kitchen and on the day of sale he called Mayes and asked him to bring the bag to the sale location which Mayes did out of friendship, oblivious to its contents. At the scene, Oliver said he took the bag and delivered it to the undercover officer, explaining to Mayes that he was meeting someone in connection to his concert promoting business. After the sale, said Oliver, he gave \$11,000 of the buy money to Mayes for safekeeping because he was "paranoid" it would be stolen, explaining to Mayes that he had been advanced the money in order to promote a concert. Oliver said that he felt bad for involving his friend in his illegal activity and that, had he been called to testify at Mayes's trial, he would have willingly confessed to his scheme and attested to Mayes's innocence, even though his own trial on the offense was still pending.

Mayes testified that Oliver told him about the above matters while the two were in the Ada County jail together awaiting their separate trials. Mayes said that he told his retained attorney of his innocence and Oliver's willingness to testify to the above details at Mayes's trial, but that his attorney inexplicably declined to call Oliver as a defense witness. Mayes's trial attorney testified differently. He said that although he met face-to-face with Mayes on numerous occasions pretrial, Mayes never proclaimed his innocence or related to him Oliver's current recitation of the alleged circumstances of the delivery or Oliver's willingness to testify on Mayes's behalf. Instead, testified the attorney, Mayes only asked what would happen if Oliver would agree to take the fall. The attorney also said that he briefly broached the subject of a "unified" defense with Oliver's attorney, but that the attorney was uninterested. Mayes's attorney also said that he decided not to call Oliver as a witness because he was concerned that this tactic would open the door to the admissibility against Mayes of two other instances of Oliver's delivery of drugs on controlled buys. In both instances, uncharged against Mayes, Mayes was observed traveling to the scenes of the buys and meeting with Oliver before Oliver delivered drugs to an undercover officer. Therefore, said the attorney, he decided it was the better defense tactic not to risk calling Oliver as a defense witness, but instead to distance Mayes from Oliver and focus the defense on the asserted lack of state evidence showing that Mayes knew what was in the shopping bag.

The district court denied relief, finding that, because Mayes's and Oliver's post-conviction testimony lacked credibility, Mayes had failed to prove deficient performance by his attorney or prejudice. With regard to lack of deficient performance, the court first found that the

attorney's testimony was more credible than Mayes's testimony concerning the content of their jailhouse conversations and, therefore, that Mayes had never told the attorney he was innocent, the details of Oliver's scheme, or that Oliver was willing to testify to these matters at Mayes's trial. The district court also found that Oliver's post-conviction testimony that he was willing to testify at Mayes's trial that he was the person who obtained (from an unspecified person) and sold one pound of cocaine *before* his own trial on the charge and *before* he was sentenced for his conduct, also lacked credibility because that testimony would have been contrary to Oliver's personal interests. Finally, the district court held that, regardless of the content of Oliver's testimony, the attorney made a reasonable, tactical decision not to call Oliver as a witness because of the risk of opening the door to the admissibility against Mayes of two other instances of Oliver's delivery of drugs on controlled buys and Mayes's culpable presence at those deliveries.

With respect to its finding of lack of deficient performance, Mayes does not directly contend that any of the district court's factual findings or legal conclusions are erroneous. Instead, and in essence, he contends that counsel's performance was deficient because he should have at least spoken to Oliver directly to determine whether he was willing to testify on his behalf and what he would say. Even if we accept Mayes's premise, it makes no difference because, for many of these same reasons and some additional ones, the district court also held that Mayes had failed to prove prejudice in that had Oliver's purported testimony been presented at trial, there was not a reasonable probability that the outcome of Mayes's trial would have been different. As noted by the district court, Mayes's current explanation of his conduct and the attending circumstances, through Oliver, was full of holes and inconsistencies that would be readily apparent to a jury. Mayes provided no cogent explanation why he would not question Oliver concerning the contents of a shopping bag Oliver allegedly left at his residence. He provided no cogent explanation why he would drive to Oliver's location to deliver it to him, as opposed to having Oliver pick it up himself. He provided no plausible explanation why he and Oliver would travel to the scene of the buy separately, why he would then wait at the scene for Oliver to transact his "business," and then meet with Oliver and accept \$11,000 in cash from him for safekeeping. He provided no explanation why, since he contended that he was unaware of the bag's contents, he would ignore the police's attempt to stop his vehicle and try to escape. Mayes's current claim that he was unwitting in the delivery of the drugs at issue is additionally

contravened by the existence of a significant amount of cocaine and \$12,000 in cash recovered from his closet safe at home, as well as a significant amount of marijuana, drug-packaging materials, and digital scales found elsewhere at the residence. In short, the district court found that the criminal trial evidence presented against Mayes was compelling and that Mayes's after-the-fact, self-serving attempt to explain away that evidence through Oliver's offered testimony was not credible, logical, or believable, and that any jury would have seen that.

Again, Mayes does not directly contend that any of the district court's factual findings or legal conclusions are erroneous. Indeed, he does not reference the court's findings or conclusions in advancing his claim of error on appeal, choosing instead to argue his case as if this Court were the trial court. In any event, on appellate consideration, we defer to the trial court's special opportunity to determine the credibility of the witnesses who have testified and to weigh the evidence presented. *State, Dep't of Health & Welfare v. Roe*, 139 Idaho 18, 22, 72 P.3d 858, 862 (2003). We find no error by the district court in denying post-conviction relief on the basis of a lack of a showing of prejudice in that had Oliver testified as presented, the outcome of the trial would not have been different.

Finally, the district court also found that Mayes's current position, that he did not know that cocaine was in the shopping bag, was not credible because he made statements in his presentence investigation report indicating the opposite. On appeal, Mayes also contends that the district court procedurally and substantively erred by taking judicial notice of his presentence investigation report. We need not review this claim of error because this was but one of many reasons the district court found Mayes's evidence not credible, therefore it had no significant effect on the outcome of this action and the error, if any, was harmless.

III.

CONCLUSION

The district court's order denying post-conviction relief is affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**