



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DARRELL BYRD,

Petitioner,

-against-

08 Civ. 0070 (LAK)

GEORGE B. ALEXANDER, Chairman,
N.Y. State Division of Parole, et ano.,

Respondents.
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ORDER

LEWIS A. KAPLAN, *District Judge.*

Petitioner Darrell Byrd was convicted in New York Supreme Court, Bronx County, on April 15, 1999 of first-degree sodomy, first-degree sexual abuse, and endangering the welfare of a child. He was sentenced principally to a term of imprisonment of six to twelve years. The conviction was affirmed by the First Department, and leave to appeal to the Court of Appeals was denied,¹ as were motions in the state court for post-conviction relief.² Byrd, who is now on parole, here seeks a writ of habeas corpus. He contends that the state court’s denial of his post-conviction ineffective assistance of counsel claim was an unreasonable application of clearly established federal law. In a report and recommendation, dated October 29, 2009 (the “R&R”), Magistrate Theodore H. Katz recommended that the petition be denied. Both petitioner and respondents object.

The Court declines to adopt all of the R&R’s reasoning but agrees with the recommendation to deny the petition. Since the ineffective assistance of counsel clam was rejected by the state court under New York Criminal Procedure Law § 440.10, this court may grant the petition only if the state court’s decision “involved an unreasonable application of clearly

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People v. Byrd, 309 A.D.3d 593, 765 N.Y.S.2d 354 (1st Dep’t 2003), *leave to appeal denied*, 1 N.Y.3d 625, 777 N.Y.S.2d 24 (2004).

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See Holland Aff. Exs. 7 (Supreme Court, Bronx County decision, dated April 11, 2005, denying motion to vacate conviction on grounds of ineffective assistance of trial counsel but ordering further forensic testing), *10* (Supreme Court, Bronx County decision, dated February 5, 2007, denying motion to vacate in its entirety).

established Federal law, as determined by the Supreme Court of the United States.”³ Petitioner must show that the state court applied the standard “in an objectively unreasonable manner.”⁴ It is insufficient to show that a state court’s application was incorrect or erroneous.⁵

To prevail on a claim of ineffective assistance of counsel, a petitioner must show a deficiency in trial counsel’s performance as well as prejudice.⁶ To establish deficiency, the petitioner must show that counsel’s representation fell below an objective standard of reasonableness.⁷ That is, he must identify acts or omissions of counsel that were not results of reasonable professional judgment. The reasonableness of the strategic decision is evaluated in terms of the adequacy of the investigation supporting it.⁸ Courts, however, must “apply[] a heavy measure of deference to counsel’s judgments.”⁹ To establish prejudice, a petitioner must show a reasonable probability that the verdict would have been different but for counsel’s unprofessional errors.¹⁰

Petitioner has failed to show that the state court’s decision on the § 440.10 motion involved an objectively unreasonable application of clearly established federal law. Petitioner has not shown that trial counsel’s actions fell below an objective standard of reasonableness. Counsel’s decisions to forgo additional DNA testing and expert advice were reasonable judgments, and she developed this strategy after investigating the benefits and risks of using an expert.¹¹ She believed that exploiting the inconclusiveness of the original test on cross examination was a better defense than contesting whether a rape actually occurred in the face of believable and sympathetic

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28 U.S.C. § 2254(d).

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Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

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Id. at 520.

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See Strickland v. Washington, 466 U.S. 668, 688 (1984).

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Id.

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Gersten v. Senkowski, 426 F.3d 588, 609 (2d Cir. 2005) (citing *Wiggins*, 510 U.S. at 525).

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Strickland, 466 U.S. at 691.

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Id. at 694.

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Id., ¶¶ 5-7.

witnesses.¹²

Nor has petitioner shown a reasonable probability that but for counsel's decisions the trial's result would have been different given the strength of the non-DNA related evidence. The jury heard the complainant's testimony about petitioner's assault. Most of this account was corroborated by a second witness who was present when the assault occurred.¹³ Portions of their testimony were corroborated by two other witnesses.¹⁴ Finally, complainant's testimony was consistent with petitioner's statements, and petitioner admitted to having had inappropriate contact with the complainant.¹⁵ In consequence, even had trial counsel done what petitioner alleges she should have done, there is no reasonable possibility that the outcome would have been different given the strength of the evidence against petitioner.

Conclusion

For the forgoing reasons, the petition for writ of habeas corpus [DI 2] is denied and the action dismissed. A certificate of appealability is denied, and the Court certifies that any appeal herefrom would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a)(3).

Dated: December 7, 2009



Lewis A. Kaplan
United States District Judge

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Holland Aff. Ex. 14, ¶¶ 5-10.

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R&R at 4.

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Id. at 6-7.

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Id. at 9-10.