

1996

Hilfiker v. Carver : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GARY D. HILFIKER, JR.,

Petitioner/Appellant,

v.

SCOTT CARVER, Warden, Utah
State Prison,

Respondent/Appellee.

Priority No. 3

Case No. 960397-CA

BRIEF OF APPELLEE

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT'S
DENIAL OF HILFIKER'S REQUEST FOR POST-
CONVICTION RELIEF, THE HONORABLE KENNETH
RIGTRUP, PRESIDING**

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

<p>GARY D. HILFIKER, JR.,</p> <p style="text-align: center;">Petitioner/Appellant,</p> <p>v.</p> <p>SCOTT CARVER, Warden, Utah State Prison,</p> <p style="text-align: center;">Respondent/Appellee.</p>	<p style="text-align: center;"><i>Priority No. 3</i></p> <p style="text-align: center;">Case No. 960397-CA</p>
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IN THE UTAH COURT OF APPEALS

<div>GARY D. HILFIKER, JR., Petitioner/Appellant, v. SCOTT CARVER, Warden, Utah State Prison, Respondent/Appellee.</div>	<div><i>Priority No. 3</i> Case No. 960397-CA</div>
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NATURE OF APPEAL AND JURISDICTIONAL BASIS

This is Hilfiker's appeal from the trial court's denial of his request for post-conviction relief. The petition challenges his conviction on the grounds that his attorney was constitutionally ineffective. The supreme court transferred this appeal under its pour-over authority, giving this Court jurisdiction. Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1995).

ISSUES AND STANDARDS OF REVIEW

Has Hilfiker overcome the strong presumption that trial counsel's representation was that of a reasonably prudent attorney, within the "wide range of professional assistance?" *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *State v. Saunders*, 893 P.2d 584, 591 (Utah App. 1995).

In reviewing a trial court's decision to deny post-conviction relief, this Court will overturn incorrect legal conclusions without hesitation, but will set aside "underlying factual findings" only if they are clearly erroneous. *Fernandez v. Cook*, 870 P.2d 870, 874 (Utah 1993). As the Seventh Circuit Court of Appeals explained in *Parts and Elec. Motors, Inc. v. Sterling Elec.*, 866 F.2d 228, 233 (7th Cir. 1988), "to be clearly erroneous, a decision must strike us as more than just maybe or probably wrong, it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish."

RELEVANT PROVISIONS

Any relevant statutes or rules are included in the text.

STATEMENT OF THE CASE

Procedural History

For stabbing his girlfriend in the head 11 times and setting her on fire with lamp oil, a jury convicted Hilfiker of criminal homicide and aggravated arson on April 27, 1992 (Crim.R. 444; PCR. 60).¹ Consequently, the criminal trial court

¹ Facts regarding the crime are also taken from the transcripts of the criminal trial, which are part of the record in this case. Because this case involves the record from two separate proceedings, Hilfiker's criminal trial and his post-conviction trial, the different records will be cited as follows: the criminal trial court's record and the criminal trial transcripts will be referred to as (Crim.R. ____); the post-conviction record and transcript will be referred to as (PCR. ____).

sentenced defendant to two five-to-life terms at the Utah State Prison (*id.*).

Through the Salt Lake Legal Defenders' office, Hilfiker appealed his conviction to this Court, claiming that the criminal trial court should have suppressed his confession; this Court disagreed and affirmed. *State v. Hilfiker*, 868 P.2d 826 (Utah App. 1994).

Six months later, Hilfiker filed this petition for post-conviction relief, alleging that his defense attorney at the criminal trial, Candice Johnson, was constitutionally ineffective (PCR. 1-4). The trial court held an evidentiary hearing where it heard from Hilfiker, Ms. Johnson, Greg Bown, who prosecuted the criminal case, and two witnesses called by Hilfiker: Doris Childs and Teresa Hilfiker (PCR. 104; 215; 223). After hearing evidence, the court rejected Hilfiker's ineffectiveness claim, denied the requested relief, and dismissed the petition (PCR. 74).

Statement of Facts

THE EVIDENCE AT THE CRIMINAL TRIAL

A few hours after the victim was found at the burned home, Hilfiker confessed (Crim.R. 724-25).² Detective James Alcock, who questioned Hilfiker

² Hilfiker's confession was taped and then transcribed. The State introduced the transcription as exhibit 37, part of the record on this appeal.

during his confession, read it into the record during the trial and the jury also was able to read the transcript as an exhibit (id.). Hilfiker admitted that after drinking alcohol and snorting about a quarter gram of cocaine, he returned to the home he was sharing with the victim, Marsha Haverty (Crim.R. 726). Ms. Haverty woke up when he entered and became upset upon learning he was high on cocaine (id.).

Depressed about other matters, including his unrequited love for a previous girlfriend and his fear that Ms. Haverty was getting too serious, Hilfiker walked into the kitchen and got a knife with which he threatened to commit suicide (Crim.R. 727). Ms. Haverty tried to console him and give him a hug, but Hilfiker pushed her away, causing her to fall on her back and hurt herself (id.). Hilfiker stabbed her next to the left eye socket and then, reads the confession, “everything was a blur” (id.). The next thing he clearly remembered was pulling the knife out and seeing blood everywhere (id.). In the confession, Hilfiker says: “I must have stabbed her. I was the only one in the house. I am not sure how many times. It is a blur. I don’t remember” (Exhibit 37 at 2).

Hilfiker did remember taking an afghan off a couch, placing it on Ms. Haverty, pouring lamp oil over it, and setting it afire with a Bic lighter (Crim.R. 728-29). Then, his memory again became blurry and he vaguely recalled getting

in his car, driving down 7th East and around town before he returned to the Haverty home, where he pretended distress to the firefighters and police (R. 730-33). Suspicious because of inconsistencies in his story and blood on his hands and clothing, the police eventually took Hilfiker in for questioning where he finally confessed (Crim.R. 732-734).³

Because defendant confessed to murdering Ms. Haverty, defense counsel took issue only with defendant's intent (Crim.R. 456). Her goal was to convince the jury to convict of manslaughter rather than criminal homicide (PCR. 180). To that end, she called a forensic toxicologist, Dr. Bryan Finkle, who testified that the combined effect of alcohol and cocaine would be like driving with one foot on the gas pedal and one on the brake, and a psychologist, Dr. Linda Gummow, who testified about Hilfiker's mental state (Crim.R. 817; 892). Dr. Gummow stated that Hilfiker had long-standing emotional problems and used drugs and alcohol abusively (Crim.R. 907-908). Due to the mixture of alcohol and cocaine, according to Dr. Gummow, Hilfiker was "extremely emotionally distraught and out of control" the night of the crime, making it unlikely that he deliberately killed the victim (Crim.R. 920). Rather, she opined, he committed

³ Defense counsel moved to suppress the confession but the trial court denied the request. On direct appeal, this Court upheld the confession's admissibility. *Hilfiker*, 868 P.2d at 828.

the murder “recklessly and secondary to an emotional disturbance that was exacerbated by drug use” (id.).

Judy Aldous, Hilfiker’s former girlfriend, told the jury she had spoken with him shortly before Ms. Haverty’s murder and she believed “everything was building up on him” (Crim.R. 888). His manager at the Ute Cab company, David Noker, stated that Hilfiker came to him late on the night before the crime; he told Noker he was “scared,” but did not say why (Crim.R. 877). Hilfiker’s drinking companions the night of the crime saw him consume at least five alcoholic beverages, including whiskey with coca-cola, whiskey straight, and tequila straight, and snort about three lines of cocaine (Crim.R. 860; 868). It was shortly after this that he returned to Ms. Haverty’s home for the last time.

EVIDENCE FROM THE POST-CONVICTION HEARING

On the stand, Hilfiker admitted that trial counsel met with him close to ten times to discuss strategy and evidence (PCR. 107; see also Findings of Fact Conclusions of Law and Order (Addendum A)). During these discussions, she told him about the maximum potential penalties, but Ms. Johnson did not recall whether she specifically discussed the potential for consecutive sentences (PCR. 63). Also, Ms. Johnson informed Hilfiker of the State’s plea bargain offer, i.e., dropping the aggravated arson charge for a plea of guilt to the homicide charge

(PCR. 62). At one point, Hilfiker wanted to take the bargain; however, because he was in tears and obviously upset, trial counsel told him to calm down and think it through before making a final decision (id.). Eventually, after thinking through the options, Hilfiker sent a letter to trial counsel thanking her for her “swell job” and telling her he would not accept a plea bargain unless it was a “gift horse” (id.).

Either trial counsel or her investigator interviewed all the witnesses Hilfiker requested, including Doris Childs and Teresa Hilfiker, who took the stand at the post-conviction hearing (PCR. 64-65). Called as Hilfiker’s witness at the post-conviction hearing, Ms. Childs lived with Hilfiker from November 1986 to April 1987 (id.). Although she stated Hilfiker was never abusive toward her, she was not aware of his 1991 domestic violence assault charge and agreed that she was not familiar with his propensity for violence as of 1992 (id.). Ms. Hilfiker was married to petitioner for three years in the mid-1980s (id.). Like Ms. Childs, Ms. Hilfiker experienced no abuse during their relationship though she too was unaware of the 1991 domestic violence charge and her ex-husband’s propensity for violence as of 1992 (PCR. 66).

At trial counsel’s request, the criminal trial court instructed the jury on the lesser included offenses of manslaughter, tampering with evidence, and

abuse/desecration of a dead body (PCR. 67). Further, the instructions contained a charge that voluntary intoxication was a defense if it negated the mental state required to commit the offense (id.). Despite these instructions, the jury convicted Hilfiker of criminal homicide and aggravated arson, the original, charged offenses.

SUMMARY OF THE ARGUMENT

The evidence from Hilfiker's criminal trial and post-conviction evidentiary hearing show that his trial counsel acted in a reasonably prudent fashion throughout her representation. On post-conviction review, Hilfiker lays out five predicate claims as examples of his counsel's insufficient performance. Because trial counsel did not actually act inadequately with regard to any of these claims, Hilfiker's overall claim of ineffectiveness lacks merit.

Hilfiker fails to marshal any evidence regarding his first challenge, i.e., to his trial counsel's purportedly eliciting negative or inconsistent information from witnesses either on cross-examination or direct. Except for one witness, Floyd Pitt, Hilfiker does not name any person who actually testified inconsistently at trial nor does he set forth that witness' alleged inconsistency. Hilfiker's failure to establish these basic facts essentially asks this Court to dig through the lengthy record. Except in capital cases, this Court is not required to do this job for the

appellant and should not do so here. On that basis alone, Hilfiker's first predicate claim should be discarded. In any event, the actual "inconsistencies," if they can be called that, in Mr. Pitts' trial testimony versus his trial statements to the police are so inconsequential they would have had no effect on the jury's deliberations even if they had been brought out by trial counsel.

Trial counsel also acted in a reasonably prudent manner in her choice not to call Hilfiker or two of his requested witnesses, Doris Childs and Teresa Hilfiker, to the stand. Hilfiker was too emotional, trial counsel recalled, to be trusted to be a good witness for himself. Ms. Childs and Ms. Hilfiker did not have any information significant to the issues in the trial because their involvement with Hilfiker ended in the mid-1980s. Further, at the post-conviction hearing, both of these women spoke of Hilfiker's "peaceful" disposition. Had this information come before the jury, the State could have brought in evidence of his prior conviction for domestic violence and other bad acts.

The post-conviction court also properly rejected Hilfiker's claim that trial counsel did not advise him that the criminal court could, as it eventually did, sentence him to two consecutive terms. The post-conviction court found that both trial counsel and the court had told Hilfiker of the maximum potential

sentences, even though trial counsel might not have specifically mentioned consecutive sentences. Thus, Hilfiker had sufficient information to refuse the offered plea bargain. In any event, post-conviction relief is not available when the claim is a missed opportunity to plea bargain.

Hilfiker's claim that witness Judy Aldous, during cross-examination, implied that he had been sent to jail for domestic violence is also off the mark. Hilfiker admitted during the post-conviction hearing that Ms. Aldous never used the word jail in his post-conviction testimony. Further, given the context of her admission that Hilfiker had physically abused her and voluntarily sought help, trial counsel might have reasonably believed the testimony helped further her overall trial strategy.

Contrary to Hilfiker's post-conviction allegation, the prosecutor's use of a styrofoam head was not outside the boundary of permissible conduct courts give attorneys during closing argument, i.e., to comment on the evidence and reasonable inferences and deductions. Neither trial counsel nor the court recalled anything objectionable about the demonstration. Consequently, counsel's decision not to object was reasonable and prudent.

Finally, Hilfiker mistakenly complains that trial counsel did not use "diminished capacity" as a defence. The record shows that although trial counsel

may not have used that term, her strategy revolved around the concept. Through testimony of a toxicologist and a psychologist, trial counsel tried to negate the levels of intent necessary for the jury to find criminal homicide and aggravated arson. This is a diminished capacity defense and trial counsel implemented it carefully.

ARGUMENT

NONE OF HILFIKER'S GRIEVANCES ABOUT TRIAL COUNSEL'S REPRESENTATION ARISE FROM CONSTITUTIONALLY DEFICIENT PERFORMANCE; THEREFORE, HE CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

In his brief, Hilfiker alleges five instances of deficient performance in trial counsel's conduct. He argues that these events meet both prongs of the test of *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which requires that trial counsel's performance fall below an objective standard of reasonableness and that the unreasonable performance prejudice the case. Deciding the ultimate question of counsel's effectiveness turns on the substantive, individual challenges Hilfiker makes: what might be called his predicate claims.

Obviously, if trial counsel made the right decisions regarding those claims, her representation met sixth amendment mandates. However, even if counsel's decisions were not the "right" decisions in retrospect, her representation will not

be considered below those mandates unless they cannot be considered “legitimate strategic choices.” *State v. Tennyson*, 850 P.2d 461, 465-66 (Utah App. 1993). Recognizing that a trial is a difficult, tense, and constantly-changing environment, courts give trial counsel wide latitude to develop and present cases, and, therefore, impose a “strong presumption that counsel’s conduct falls within the wide range of professional assistance. *Strickland*, 466 U.S. 689; *Tennyson*, 850 P.2d at 465. Similarly, “acts or omissions [that] might be considered sound trial strategy” are immunized from attack. *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993).

I. Hilfiker does not state what testimony his counsel elicited from defense witnesses that conflicted with previous statements or his confession; therefore, this Court cannot meaningfully review the challenge and it cannot serve as a predicate to an ineffective assistance claim.

The first complaint with trial counsel’s work is that she obtained testimony from witnesses that either conflicted with previous statements or contradicted Hilfiker’s confession. Brief of Petitioner at 7. The unstated corollary of this claim is that these discrepancies harmed Hilfiker’s case. However, except for Floyd Pitts, a witness for the State, Hilfiker fails to present the discrepancies or name the witnesses whose testimonies conflicted with the alleged previous statements or the confession. Therefore, it is impossible to evaluate the

substance of Hilfiker's claim except for his assertion that Pitts' testimony contradicted itself and "changed many times." Brief of Petitioner at 7.

Here even, Hilfiker does not explain what particular parts of Pitts' testimony changed, preventing this Court from conducting any meaningful review. *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah App. 1993) (marshaling provides basis "from which [appellate court can] conduct a meaningful and expedient review of facts challenged on appeal."). What is remarkable about Hilfiker's failure to marshal is not that he just fails to compile the evidence in **support** of the trial court's findings, but that he fails to compile any evidence at all. This complete failure asks the Court to speculate about the evidence and dig through the transcripts on its own. *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (holding that reviewing court is not a "depository in which the appealing party may dump the burden of argument and research").

Because Hilfiker has failed to present any evidence supporting his assertions in compliance with marshaling, this Court should refuse to examine the claim on the merits. *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992).

Being thus precluded from review on the merits of this predicate claim, Hilfiker cannot use this charge as foundation for his ineffectiveness challenge.⁴

II. Trial counsel's decision not to call Hilfiker to the stand and her decision not to call Doris Childs, Teresa Hilfiker, or Dr. Craig Hyatt was within the wide range of permissible discretion courts grant defense counsel in deciding how to implement trial strategy.

As the post-conviction court stated in its findings, trial counsel called six witnesses on Hilfiker's behalf, including two experts, a toxicologist and psychologist (PCR. 69-71; Findings of Fact Conclusions of Law and Order (Addendum A)). These witnesses stated their observations of Hilfiker's behavior the night of the crime, his alcohol and cocaine intoxication, and his evident stress (See Statement of Facts at 6-7). With this evidence, trial counsel showed the jury a person who was intoxicated, mentally unstable, and extremely emotional. The goal was to convince the jury that, in the words of Dr. Gummow, the murder of Marsha Haverty was reckless and not deliberate, that Hilfiker was incapable of

⁴ Even were this Court to ignore Hilfiker's failure to marshal any evidence, the post-conviction evidentiary transcript shows that the claimed inconsistencies are inconsequential and could not have had any effect on the resulting verdict. The "inconsistencies" included whether Mr. Pitts did or did not follow Ms. Haverty home the night of the crime and the amount of time Mr. Pitts knew Hilfiker (PCR. 138-39). Neither of these issues pertain to any of the issues in the criminal trial, i.e., Hilfiker's mental state when he committed the crime. The State called Pitts merely to identify a jacket found at the burring home as one he had seen Hilfiker previously wear (Crim.R. 530).

forming a deliberate intent due to his intoxication (Crim.R. 920; PCR. 67; Findings of Fact Conclusions of Law and Order (Addendum A)).

The failure to reach this goal is not a legitimate criticism of trial counsel's attempts at it. *State v. Bullock*, 791 P.2d 155, 160 (Utah 1989) ("failure to produce expected result does not constitute ineffectiveness of counsel"). Yet, Hilfiker claims that the addition of his testimony along with three other witnesses would have brought about his expected result. Brief of Petitioner at 8. However, he does not say what this testimony would have been other than that it would have "humanized" him and "mitigated" his crime. *Id.* This again asks the trial court to do the research and investigation that is Hilfiker's job to do. *Bishop*, 753 P.2d at 450.

In any event, Hilfiker's assertion that the jury was entitled to hear "mitigating" evidence is legally wrong. Brief of Petitioner at 8. In capital cases, the jury has a sentencing function and a part of the trial is dedicated to establish either aggravating or mitigating circumstances so that the jury can decide the appropriate sentence. Utah Code Ann. § 76-3-207 (1995). Juries in non-capital cases do not play this role. In fact, the jury here was given an explicit instruction that prohibited it from considering the sentence in its guilt vs. innocence determination (Crim.R. 136).

Additionally, trial counsel had legitimate reasons not to call Hilfiker to the stand. Not only was he very emotional, leading her to fear he might hurt his case, but he also had no other information to give the jury (PCR. 71, Findings of Fact Conclusions of Law and Order (Addendum A); 204-06). Trial counsel stated her reasons for recommending against testifying in the post-conviction hearing.

I felt that Gary [Hilfiker] at that time could not help his case anymore and might hurt his case given his -- his feelings about his response during the course of trial. It was an upsetting situation for him. He had nothing further to tell the jury that I could imagine. He had to undergo cross-examination from Mr. Bown. Under cross-examination, there is always a chance that things can go wrong for someone. And it was my decision that basically we had everything that we needed. I would only recommend that a defendant take the stand if it was absolutely critical to the defense, there was no additional information that could be offered or if the Defendant absolutely insisted on taking the stand. And if the defendant insisted on taking the stand, I would put him on the stand. He did not.

(PCR. 187).

Trial counsel was aware of Ms. Children' and Ms. Hilfiker's potential testimony, which when brought forth at the post-conviction hearing consisted of their remembrances of Hilfiker from the early-to-mid-1980s as a non-violent person (PCR. 216-28). Ms. Children lived with Hilfiker for approximately six

months; Ms. Hilfiker was married to him for three years (*id.*). Trial counsel's decision not to place these women on the stand was legitimate and reasonable. As the post-conviction court concluded, had any witness "opened the door" by referring to Hilfiker's peacefulness, the State could have introduced his prior conviction and other "bad acts" (PCR. 71; Findings of Fact Conclusions of Law and Order (Addendum A)).

Further, neither witness, according to trial counsel, had significant other information to disclose that would have been helpful to the case (PCR. 174-76). Under these circumstances, the decision not to call either Ms. Children or Ms. Hilfiker was reasonable. *See State v. Huggins*, 294 Utah Adv. Rep. 8, 11 (Utah App. filed July 1996) (where suggested witnesses would not have contributed significant information and could have opened the door to prior convictions, trial counsel's decision not to call them was appropriate). Trial counsel's choice of witnesses was one any reasonably prudent attorney would have taken. It was designed to persuade the jury to convict of lesser-included offenses and minimize potential damage to the overall case (PCR. 67 (Findings of Fact Conclusions of Law and Order (Addendum A))).

III. Trial counsel gave Hilfiker sufficient information for him to make a proper decision about the plea bargain, which, in any event, is not a legitimate basis for post-conviction relief; therefore, trial counsel did not perform inadequately.

Before the criminal trial, the State offered Hilfiker a plea agreement that would require him to plead guilty to the homicide charge in exchange for dismissal of the aggravated arson charge (PCR. 62, Findings of Fact Conclusions of Law and Order (Addendum A)). At one point, Hilfiker told trial counsel he wanted to accept the offer but, because he was very emotional then, she asked him to wait before making a decision (*id.*).

Eventually Hilfiker told trial counsel, via a letter he sent through Doris Children, that he would not accept a plea bargain unless it was a “gift horse” (PCR. 63). On post-conviction review, the trial court construed this statement as indicating that Hilfiker would plead only to a lesser-included offense, such as manslaughter and would no longer accept the State’s offer (*id.*). Hilfiker now claims trial counsel did not let him know that, if he went to trial and was convicted of both first-degree felonies, he could be sentenced consecutively. Brief of Defendant at 9. Thus, asserts Hilfiker, he was inadequately advised about the risks of refusing the bargain.

After the post-conviction evidentiary hearing, the post-conviction court rejected this allegation, finding that trial counsel and the criminal trial court had discussed the maximum penalties for each offense with Hilfiker (PCR. 69, Findings of Fact Conclusions of Law and Order (Addendum A)). Thus, although trial counsel might not have specifically mentioned the possibility of consecutive sentences, Hilfiker had enough information to make an informed refusal of the State's offer (*id.*). Hilfiker again does not marshal the evidence in support of this finding. Therefore, this Court assumes it is adequately supported by the record and proceeds to the resulting legal conclusion. *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992). The post-conviction court ruled that counsel's representation was within the wide range of professional assistance and, thus, not grounds for an ineffectiveness claim (PCR. 72, Findings of Fact Conclusions of Law and Order (Addendum A)).

This ruling is correct. “[The] state and federal constitutions guarantee fair trials, not plea bargains.” *State v. Knight*, 734 P.2d 913, 919 n.7 (Utah 1987) (citing *State v. Geary*, 707 P.2d 645, 646 (Utah 1985)). Therefore, even if trial counsel's representations to Hilfiker regarding the plea were open to question, post-conviction relief simply is not available to remedy a criminal defendant's failure to accept a plea bargain. *See Parsons v. Barnes*, 871 P.2d 515, 519 (Utah

1994) (habeas relief available where defendant has suffered a “substantial and prejudicial denial of a constitutional right:); *Salazar v. Warden*, 852 P.2d 988, 991 (Utah 1993) (relief via post-conviction available only to remedy “substantial denial of a constitutional right”).

IV. Contrary to Hilfiker’s assertion, Judy Aldous did not imply that he went to jail for abusing her or was ever convicted for domestic violence; in any event, information that he voluntarily sought help for this problem was harmless error, if error at all.

Hilfiker argues that, on cross-examination, Judy Aldous implied that he was sent to jail because of physical abuse. Brief of Defendant at 9. Trial counsel called Ms. Aldous to testify to the stress Hilfiker was experiencing the days before the murder (Crim.R. 888). During cross-examination, the prosecutor asked Ms. Aldous if Hilfiker had ever physically abused her (*id.*). She admitted abuse but also stated that Hilfiker recognized the problem and voluntarily called the police and “asked for help” (Crim.R. 890). Contrary to Hilfiker’s current claim, Ms. Aldous never stated he was sent to jail or convicted for domestic violence; indeed, Hilfiker admitted this at the evidentiary hearing (PCR. 156).

Ms. Aldous’ statements provide no reasonable grounds for Hilfiker’s assertion that they implied he was jailed or convicted. They do not conflict with the pre-trial order suppressing Hilfiker’s prior convictions (Crim.R. 69-70).

Also, given that Ms. Aldous provided evidence of a repentant Hilfiker, trying to control his emotions and violence, a reasonably prudent attorney may have decided not to object on the reasonable belief that it would help her overall theory of no deliberate intent. *State v. Villareal*, 889 P.2d 419, 427 (Utah 1995) (depending on circumstances, refusing to object may be a legitimate trial strategy).

In any event, this testimony did not prejudice Hilfiker's case. To show this, Hilfiker would need establish a reasonable possibility that, but for the evidence, the outcome of the trial would have ended more favorably, i.e., in a verdict for lesser-included offenses. *Huggins*, 294 Utah Adv. Rep. at 11. On balance with the rest of the evidence, the information Ms. Aldous gave the jury was not of such significance that it alone would have swayed the jury's vote. Therefore, neither Ms. Aldous' testimony nor trial counsel's decision not to object to it was ineffective.

V. The prosecutor's use of the styrofoam head during closing argument was not out-of-line to such an extent that trial counsel was constitutionally obligated to object.

In his transcribed confession, admitted at the trial and read into evidence, Hilfiker claimed he had cut his hand on the window while trying to get into the

burning home (Exhibit 37 at 13). During closing argument, the prosecutor attacked this claim, using a styrofoam model head to show the jury how the cutting could have happened and the force required to do so (Crim. R. 660-61). From the prosecutor's remarks, his display was intended to show that Hilfiker had used deliberate rather than reckless action.

Showing you this Styrofoam head, showing you the murder weapon. How could he cut his hand? Well, blood's all over the place; blood's slippery. It is on the handle. We know his blood is on the handle, and her blood is all over the place....There is this z-shaped wound where a chip of blood -- a chip of bone was actually taken from the skull. What would happen if there is a blow and it chips? It stops in the bone. It chips and stops. What happens with a slippery object (Indicating)? It cuts your hand. That's how it happened.

Id.

Neither trial counsel nor the court intervened (R. 72). The demonstration appears to have been reasonably based on the "evidence and the inferences and deductions arising therefrom." *State v. Parsons*, 781 P.2d 1275, 1284 (Utah 1989) (holding that counsel have wide latitude in closing arguments to discuss evidence). During the post-conviction hearing, Hilfiker and his two witnesses, Doris Children and Teresa Hilfiker, stated the jury appeared to be "shocked" by the display (PCR. 71; Findings of Fact Conclusions of Law and Order

(Addendum A)). Nevertheless, the post-conviction court was within its discretion to believe instead the testimony of the criminal trial counsel who found nothing objectionable (PCR. 208; PCR. 72 (Addendum A)). Trial counsel's decision not to object to the closing argument was a reasonably prudent one (*id.*).

VI. Hilfiker's complaint that trial counsel did not present evidence of "diminished capacity" should be rejected because it is factually incorrect; Hilfiker's alleged inability to form a deliberate intent due to intoxication was the centerpiece of trial counsel's strategy and it was well implemented.

Because his confession severely limited trial counsel's options, her defense of Hilfiker rested on persuading the jury that his intoxication negated his ability to form the intentional or knowing "intent" needed to establish criminal homicide (PCR. 191; 67, Findings of Fact Conclusions of Law and Order). This is a "diminished capacity" defense. "Appropriate testimony showing that defendant's intoxication negated the existence of the mental state which is an element of the offense would be a form of evidence bearing on diminished mental capacity." *State v. Cummins*, 839 P.2d 848, 857 n.24 (Utah App. 1992). Though trial counsel did not use the term "diminished capacity," that concept was the keystone of her strategy and she implemented it with the testimony of Dr. Gummow, Dr. Finkle and the non-expert witnesses who testified to Hilfiker's

heavy use of alcohol and cocaine. Hilfiker was in total agreement with this strategy (PCR. 68, Findings of Fact Conclusions of Law and Order).

Dr. Gummow stated that due to the combined use of alcohol and cocaine, together with his general emotional state, she did not believe Hilfiker could have killed the victim deliberately (Crim.R. 920). Trial counsel argued Hilfiker's mental state extensively in closing, commenting on his intoxication and his general emotional state as well as on Dr. Gummow's testimony (Crim.R. 1019-1021).⁵ Trial counsel also requested and received an instruction on voluntary intoxication and "extreme emotional disturbance," along with the lesser-included offense instructions, which she also argued at closing (Crim.R. 1024; PCR. 131). Trial counsel relied on Hilfiker's intoxication to negate the necessary intent for both crimes. Just because the defense was not successful does not render trial counsel ineffective.

⁵ Hilfiker cites to two letters in his "supplemental record" from Dr. Gummow that indicate trial counsel did not use evidence of "diminished capacity." These letters are not appropriately part of the record. On April 12, 1996, the Utah Supreme Court ordered the district court clerk to supplement the post-conviction record with the criminal trial record (attached as Addendum B). This is the only supplementation order in this case. Dr. Gummow's letters were not before the criminal court or the post-conviction court. Therefore, pursuant to rule 24(j), Utah Rules of Appellate Procedure, these letters, and all Hilfiker's purported "supplemental record" should be stricken.

Nevertheless, Dr. Gummow's letters are not significant. Given the evidence and argument trial counsel actually used at trial, Dr. Gummow simply seems confused about the various ways the concept "diminished capacity" can be used without ever using the term.

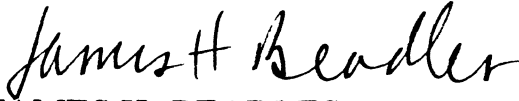
None of Hilfiker's grievances rise to the level of ineffective assistance of counsel. Because of the confession and the nature of the crime, trial counsel's options were limited to persuading the jury to accept lesser-included offenses (PCR. 67, Findings of Fact Conclusions of Law and Order). Trial counsel discussed this strategy with Hilfiker who "supported it enthusiastically until it produced an unfavorable verdict." *State v. Webb*, 790 P.2d 65, 76 (Utah App. 1990). Hilfiker cannot establish deficient performance in any aspect of trial counsel's representation.

CONCLUSION

This Court should affirm the post-conviction court's denial of Hilfiker's requested relief and the dismissal of his petition.

RESPECTFULLY SUBMITTED THIS 23rd day of September 1996.

JAN GRAHAM
UTAH ATTORNEY GENERAL


JAMES H. BEADLES
Assistant Attorney General
Criminal Appeals Division

CERTIFICATE OF MAILING

On 23 September 1996, I mailed, by U.S. Mail, postage prepaid, two
copies of this ***BRIEF OF APPELLEE*** to:

GARY D. HILFIKER
Utah State Prison
P.O. Box 250
Draper, Utah 84020

James H. Butler

A D D E N D A

A D D E N D U M A

FILED DISTRICT COURT
Third Judicial District

AUG 8 1995

By *H. J. Howard*
SALT LAKE COUNTY
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

GARY D. HILFIKER, JR.,	:	
	:	FINDINGS OF FACT
Petitioner,	:	CONCLUSIONS OF LAW
v,	:	AND ORDER
	:	
STATE OF UTAH,	:	Case No. 940903984 HC
	:	
Respondent.	:	Judge Kenneth Rigtrup
	:	

The above-captioned matter came before the Court on June 21-22, 1995 for an evidentiary hearing on the petition for extraordinary relief pursuant to rule 65B, Utah Rules of Civil Procedure. Petitioner was present and was represented by Dean C. Andreasen. Respondent was represented by Angela F. Micklos and David E. Yocom, Assistant Attorneys General. After reviewing the file in this matter and in the underlying criminal matter, and

after hearing oral testimony and counsel's arguments, the Court now enters the following.

FINDINGS OF FACT

1. On April 27, 1992, petitioner was charged by information with criminal homicide, a first degree felony, and aggravated arson, a first degree felony. After a jury trial on November 10-14, 1992, petitioner was convicted of both counts. On December 14, 1992, the trial court sentenced petitioner to serve five-years-to-life on each count, to run consecutively.

2. On April 29, 1992, Candice Johnson entered her appearance of counsel and a request for discovery on petitioner's behalf.

3. Ms. Johnson met often with petitioner in the jail from May 1992 until the time of trial in November 1992. During one of Ms. Johnson's visits with petitioner at the jail prior to the preliminary hearing, Ms. Johnson discussed with petitioner a possible plea agreement that they could seek from the prosecutor. Ms. Johnson told petitioner that they could request a plea agreement which would allow petitioner to plead to manslaughter, a

second degree felony, and destruction of evidence, a third degree felony.

4. The only plea agreement offered by the prosecutor provided that the aggravated arson charge would be dismissed if petitioner pled to the first degree murder count as charged. Ms. Johnson discussed the plea agreement with petitioner. Petitioner was very upset and stated that he just wanted to plead and get things over with. Ms. Johnson testified that she would never allow a client to plead guilty in such a distraught state of mind and, that therefore, she advised petitioner to think it over and told petitioner that she would discuss the matter with him again when he was thinking more clearly.

5. Ms. Johnson's advice to petitioner to postpone deciding whether he wanted to plead guilty until he was thinking more clearly was sound and rational.

6. During her discussions with petitioner regarding the plea agreement, Ms. Johnson informed petitioner that he would be pleading to a first degree felony which carried a penalty of five-years-to-life at the prison. Ms. Johnson also informed petitioner

that she would try to get second and third degree convictions at trial, which would carry a 1-15 year and 0-5 year penalty, respectively. Ms. Johnson has no specific memory of discussing the possibility of consecutive sentences, but she did discuss the maximum penalties for each offense. Ms. Johnson told petitioner that he would definitely go to prison and that the only issue was for how long.

7. Petitioner made the ultimate decision whether to accept the plea agreement or to proceed to trial. Ms. Johnson did not coerce petitioner into going to trial.

8. On October 14, 1992, petitioner sent Ms. Johnson a letter thanking her for the "swell job" that she was doing and stating that he would not accept a plea agreement unless it was a "gift horse." The rational implication of petitioner's statement is that he would only accept a plea bargain to manslaughter or another lesser offense.

9. On December 15, 1992, petitioner, through his friend, Doris Childs, sent Ms. Johnson a card thanking her for all that she had done on petitioner's behalf.

10. Prior to petitioner's decision to proceed to trial, Ms. Johnson received all discoverable information from the prosecutor's file and personally viewed all of the physical evidence with the prosecutor, Greg Bown.

11. To the best of her knowledge, Ms. Johnson, either personally or through her investigator, Dennis Couch, spoke to all of the potential witnesses that petitioner asked her to contact. Specifically, Ms. Johnson testified that either she or Mr. Couch spoke to:

- a. Dave Noker, petitioner's employer who testified at trial;
- b. Brian Singer, a bartender who testified at trial;
- c. Gary Freer, petitioner's friend who testified at trial;
- d. Judy Aldous, petitioner's former girlfriend who testified at trial;
- e. All of petitioner's neighbors who were interviewed by the police;
- f. Debbie Corises, a friend of the victim, Marsha Haverty;
- g. Teresa Hilfiker, petitioner's ex-wife;
- h. Doris Childs, petitioner's friend; and

i. Elaine Densley, a friend of the victim, Marsha Haverty.

12. Petitioner testified that he wanted Ms. Johnson to call as witnesses: Teresa Hilfiker, Doris Childs, and Dr. Craig Hyatt (Ms. Haverty's son's psychologist).

13. At the post-conviction evidentiary hearing, Doris Childs testified that she dated petitioner for approximately six months from November 1986 until April 1987. Ms. Childs testified that during their relationship, petitioner never physically abused her or used physical force. Ms. Childs acknowledged that she was not aware that petitioner was charged in 1991 with a domestic violence assault and that as of 1992, she had no current knowledge regarding petitioner's propensity for violence; Ms. Childs' knowledge of petitioner's character was based on her six-month relationship with petitioner in 1986-87.

14. At the post-conviction evidentiary hearing Teresa Hilfiker, petitioner's ex-wife, testified that she was married to petitioner from 1984-1987. Ms. Hilfiker testified that during their marriage, petitioner never assaulted or physically abused her. *DCA*
Ms. Hilfiker acknowledged that she was not aware that petitioner

was charged in 1991 with a domestic violence assault and that as of 1992, she had no current knowledge regarding petitioner's propensity for violence.

15. Petitioner was also represented by Leshia Lee-Dixon, who, entered her appearance as co-counsel on October 8, 1992. Ms. Lee-Dixon's role in this case was limited primarily to opening statement, cross-examination of some police witnesses, preparing Dr. Finkle, and legal research. Petitioner has not challenged Ms. Lee-Dixon's effectiveness.

16. Petitioner confessed to the police that he stabbed Marsha Haverty and subsequently poured kerosene over her and set her on fire. In addition to petitioner's confession, there was a significant amount of blood evidence which incriminated petitioner.

17. Ms. Johnson filed a motion to suppress petitioner's confession. The trial court denied the motion to suppress the confession but granted Ms. Johnsons' motion to suppress petitioner's prior convictions¹.

¹Petitioner was convicted of burglary in 1978, aggravated burglary in 1979, and attempted theft in 1982. Additionally, petitioner was charged in 1990 with soliciting sex and in 1991 with

18. In light of the evidence against petitioner, Ms. Johnson determined that the only sound trial strategy was to convince the jury that petitioner was guilty only of lesser included offenses because he lacked the requisite mental state for the first degree felonies. In Ms. Johnson's professional opinion, petitioner's confession severely limited available defense theories and convinced her to pursue a manslaughter conviction based upon petitioner's cocaine and alcohol consumption.

19. The jury was instructed on the following lesser included offenses: manslaughter, tampering with evidence, and abuse/desecration of a dead human body. Additionally, the jury was instructed that voluntary intoxication is a defense if it negates the mental state required to commit the offense(s).

20. In preparing her trial theory, Ms. Johnson asked petitioner to write down any details of the crime that he remembered. Petitioner indicated to Ms. Johnson that he had been drinking and ingesting cocaine on the night of the murder and that

a domestic violence assault. The disposition for these charges is unlisted.

he did not recall actually stabbing Ms. Haverty, but remembered pulling the knife out of her body and subsequently lighting her body on fire. Petitioner also indicated to Ms. Johnson that he remembered leaving the house after starting the fire and returning a short time afterward.

21. Ms. Johnson discussed with petitioner the trial strategy and petitioner indicated to Ms. Johnson that he was in total agreement with the defense theory.

22. Ms. Johnson called the following defense witnesses in support of the trial theory:

a. Dr. Bryan Finkle, a well-recognized and respected toxicologist, who testified that cocaine and alcohol affect different parts of the brain, and that taking both substances at the same time is like driving with one foot on the gas pedal and one foot on the brake pedal at the same time.

b. Dr. Linda Gummow, a psychologist who had met with petitioner on two occasions for two-and-a-half hours each session and had reviewed the autopsy reports, blood reports, police statements, and legal statutes. Dr. Gummow testified that if

petitioner had been intoxicated from alcohol and cocaine, it would not have been unusual for him to forget specific details of the crime. Dr. Gummow also testified that although petitioner did not meet the legal definition of mentally ill, petitioner could not have formed the intent to kill Ms. Haverty. Dr. Gummow testified that petitioner acted recklessly due to the cocaine and alcohol use, combined with his emotional disturbance.

c. Brian Singer, a bartender who testified about the number of drinks petitioner had at Charlies' Bar on the night of the murder.

d. Gary Frear, a man who used to shoot darts with petitioner at Charlies', testified that he saw petitioner at the bar around 6:00 or 6:30 the evening of the murder. Mr. Frear testified that petitioner had approximately five drinks and snorted a white powdery substance on three different occasions outside in the bar parking lot (approximately 9:30 p.m., 11:00 p.m., and 12:30 a.m.) on the night of the murder. Mr. Frear further testified that petitioner left Charlies' at approximately 1:30 a.m. and that petitioner still had some white powdery substance in his bag.

e. David Noker, the manager at Ute Cab Company, and petitioner's former boss. Mr. Noker testified that petitioner liked to drink quite a bit and that on the Tuesday prior to the murder, petitioner seemed distraught and attempted after work to discuss (with Mr. Noker) his emotional problems.

f. Judy Aldous, petitioner's former girlfriend, testified that she dated petitioner off and on for six years and that petitioner drank to excess too often and used cocaine when he drank. Ms. Aldous also testified that on one occasion, petitioner physically abused her, however it was petitioner who called the police and stated that he needed help.

23. Ms. Johnson discussed many times with petitioner, the option of petitioner testifying on his own behalf. In fact, Ms. Johnson prepared petitioner to testify. However, after the defense witnesses had testified; Ms. Johnson told petitioner that all of the necessary evidence had come in through other witnesses and that in her professional opinion, petitioner's testimony was not needed, and that petitioner could in fact hurt his case by testifying.

24. If either petitioner or other character witnesses had testified regarding petitioner's peacefulness or lack of violence, petitioner would have opened the door for the prosecutor to attempt to impeach petitioner with petitioner's prior convictions and bad acts. Petitioner would have been prejudiced if the jury had heard about petitioner's prior acts of violence.

25. Petitioner's case was thoroughly presented through the numerous defense witnesses, which included two experts who bolstered petitioner's defense theory. It was appropriate for Ms. Johnson to advise petitioner not to take the stand since all the necessary evidence had already been admitted.

26. Petitioner made the ultimate decision, after receiving Ms. Johnson's professional opinion, to refrain from testifying on his own behalf. Ms. Johnson did not prevent petitioner from testifying.

27. At the post-conviction evidentiary hearing, Ms. Childs and Ms. Hilfiker testified that during his closing argument, the prosecutor, Greg Bown, repeatedly stabbed a styrofoam head and that the jury appeared to be shocked.

28. Neither Ms. Johnson nor Mr. Bown recalled the use of the styrofoam head during closing argument. Ms. Johnson testified that she did not see anything objectionable about Mr. Bown's closing argument and would have objected to anything prejudicial.

29. If Mr. Bown's closing argument had been exaggerated or prejudicial, the court would have interceded. Mr. Bown's closing argument was within reasonable bounds.

30. Ms. Johnson's representation of petitioner was very thorough and professional and within the wide range of reasonably competent assistance.

31. Petitioner does not have a constitutional right to be informed of all the possible ramifications of going to trial. Nevertheless, petitioner failed to demonstrate that had Ms. Johnson advised him differently, he would have insisted upon accepting the plea agreement.

32. Petitioner has failed to demonstrate that had Ms. Johnson called certain character witnesses at trial, or cross-examined the State's witnesses differently, or objected to Mr. Bown's closing

argument, a reasonable probability exists that the outcome would have been different.

33. Since Ms. Johnson effectively represented petitioner at trial, petitioner's appellate counsel, Joan Watt, was not ineffective for failing to raise on direct appeal, the issue of Ms. Johnson's ineffectiveness.

CONCLUSIONS OF LAW

1. Petitioner has the burden of satisfying, by a preponderance of the evidence, the standard of ineffective assistance of counsel announced in Strickland v. Washington, 466 U.S. 668, 688 (1984). Therefore, petitioner must demonstrate both that: specific acts or omissions fall outside the wide range of professionally competent assistance; and counsel's deficient performance prejudiced the outcome of the proceeding.

2. Petitioner has failed to meet either prong of the Strickland standard.

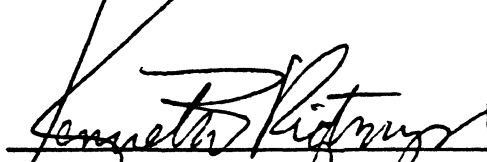
ORDER

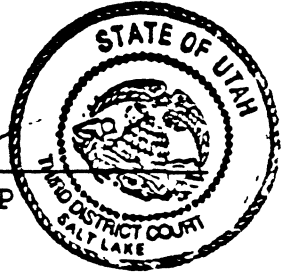
Base on the foregoing, the Court now **ORDERS** as follows:

1. The relief requested in the petition is denied.
2. The petition is dismissed on the merits with prejudice.


DATED this 8th day of August, 1995.

BY THE COURT:


HONORABLE KENNETH RISTRUP
Third District Court



Approved as to form:


Dean C. Andreasen
Attorney for petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the
foregoing **FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER** was ^{hand-delivered} mailed,
postage prepaid, this 31st day of July, 1995 to:

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ORIGINAL

FILED

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CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

GARY D. HILFIKER, JR.,	:	ORDER TO SUPPLEMENT THE
	:	RECORD
Petitioner/Appellant.	:	
v.	:	Case No. 950486
STATE OF UTAH,	:	
	:	
Respondent/Appellee.	:	

Pursuant to appellee's motion and good cause appearing, the Court **ORDERS** the clerk of the Third Judicial District Court, Salt Lake County, to supplement the record in Gary D. Hilfiker, Jr. v. State of Utah, 940903984 HC, with the record in State of Utah v. Gary D. Hilfiker, Jr., 921900991. The clerk is directed not to re-paginate the record in case number 921900991, but should reference case number 921900991 as a single volume supplement to the record in case number 940903984 HC.

DATED this 16th day of April, 1996.

BY THE COURT:

