UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7146

CARL PROSTELL,

Petitioner - Appellant,

v.

DAVID ZOOK,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:17-cv-01328-LO-TCB)

Submitted: March 27, 2019 Decided: April 11, 2019

Before DIAZ and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Carl Prostell, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

(A)

PER CURIAM:

Carl Prostell seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Prostell has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Carl Prostell,	)	
Petitioner,	)	
	)	
v.	)	**1:17cv1328 (LO/TCB)**
	)	
David Zook,	)	
Respondent.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, respondent's Motion to Substitute Proper Party and Motion to Dismiss [Dkt. No. 15] is GRANTED, and David Zook is substituted as the proper respondent, and petitioner's request for an evidentiary hearing [Dkt. No. 1] is DENIED, and it is hereby

ORDERED that this petition be and is DISMISSED, WITH PREJUDICE.

To appeal this decision, petitioner must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. See Fed. R. App. P. 4(a). A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wants to appeal. Petitioner need not explain the grounds for appeal until so directed by the Court. Failure to timely file a notice of appeal waives the right to appeal this decision. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). This Court expressly declines to issue such a certificate for the reasons stated in the Memorandum Opinion.

(B)

The Clerk is directed to enter final judgment in favor of respondent David Zook, pursuant to Fed. R. Civ. P. 58, to send a copy of this Order and the Memorandum Opinion to petitioner and counsel of record for respondent, and to close this civil action.

Entered this 4th day of September 2018.

Alexandria, Virginia

/s/
Liam O'Grady
United States District Judge

(B)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Carl Prostell	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:17-cv-01328 LO/TCB
	)	
	)	
David Zook	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the order of this Court entered on 9/4/2018 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the David Zook and against the Carl Prostell.

FERNANDO GALINDO, CLERK OF COURT

By:_____/s/_____
A.Otto
Deputy Clerk

Dated: 9/5/2018
Alexandria, Virginia

(B)

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

CARL PROSTELL, NO. 1489352,
Petitioner

v. Case No. CL16H01524

LESLIE FLEMMING, WARDEN,
Respondent.

FINAL ORDER

This matter came before the Court on the petitioner's Writ of Habeas Corpus, and the respondent's Motion to Dismiss. Upon mature consideration of the pleadings and exhibits, controlling legal authority and the record in the criminal case of Commonwealth v. Carl Prostell, Case Nos. Case No. 00347-13 and 00406-13, which is hereby made a part of the record in this matter, the Court makes the following findings of fact and conclusions of law:

The petitioner, Carl Prostell, is in custody pursuant to a final order of this Court entered on April 16, 2014. Case No. 00347-13 and 00406-13. On June 21, 2013, Prostell was found guilty of aggravated malicious wounding in violation of Va. Code § 18.2-51.2 and of violating a protective order resulting in serious bodily injury in violation of Va. Code § 18.2-60.4. On April 16, 2014, the Court sentenced Prostell to fifty-five years' imprisonment with twenty-five years suspended, for an active sentence of thirty years.

The petitioner appealed the convictions. The Court of Appeals of Virginia denied his appeal by per curiam order on January 29, 2015, and by three-judge panel on May 14, 2015.

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AG + DOF

(C)

EXHIBIT
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Record No. 0923-14-1. The Supreme Court refused Prostell's appeal on February 17, 2016, and denied rehearing on May 13, 2016. Record No. 150940.

On or about October 21, 2016, Prostell timely filed the instant petition, attacking the validity of his conviction based on the following claims: (I) ineffective assistance of counsel for not presenting mitigating evidence from the defendant's childhood; (II) ineffective assistance of counsel for not requesting a different judge after Prostell withdrew his guilty plea; (III) the evidence was insufficient to prove every element of malicious wounding; (IV) the trial court abused its discretion in finding that the petitioner struck the victim more than one time; and (V) and the trial court abused its discretion when it allowed the petitioner to go forward in front of the court after withdrawing his plea.

NON-COGNIZABLE CLAIM

The Court finds that Prostell's challenge to trial court error in claims (III) and (IV) are not cognizable in habeas corpus and must be dismissed. In these claims, Prostell is challenging the Court's findings of guilt and fact, which are not cognizable in habeas corpus because they were previously litigated on direct appeal. "[A] non-jurisdictional issue raised and decided either in the trial or on direct appeal from the criminal conviction will not be considered in a habeas corpus proceeding." Henry v. Warden, 265 Va. 246, 249, 576 S.E.2d 495, 496 (2003).

The Court also finds that Claim (V) is also not cognizable in habeas corpus because Prostell could have raised it at trial or on appeal. Morrisette v. Warden, 270 Va. 188, 188, 613 S.E.2d 551, 554 (2005). "A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974). "A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction."

Id. at 30, 205 S.E.2d at 682. Accordingly, the Court finds that petitioner's challenges in claims (III), (IV), and (V) are not jurisdictional and non-cognizable in habeas corpus. Therefore, claims (III), (IV), and (V) are dismissed.

INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance, a habeas petitioner must satisfy the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, the burden is on the petitioner to prove both deficient performance by his counsel and prejudice. See Strickland, 466 U.S. at 687. "Unless [petitioner] establishes both prongs of the two-part test, his claims of ineffective assistance of counsel will fail." Jerman v. Director of the Dept. of Corrections, 267 Va. 432, 438, 593 S.E.2d 255, 258 (2004); see Harrington v. Richter, 562 U.S. 86, 109 (2011).

To satisfy Strickland's performance prong, "the defendant must show that . . . counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; see also Bowles v. Nance, 236 Va. 310, 374 S.E.2d 19 (1988). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688.

To satisfy Strickland's prejudice prong, petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id. "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

An ineffective assistance of counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements." Spencer v. Murray, 18

F.3d 229, 232-33 (4th Cir. 1994). See also Smith v. Spisak, 558 U.S. 139, 149-55 (2010) (applying only the "prejudice" prong of Strickland test); Williams v. Warden, 278 Va. 641, 647-49, 685 S.E.2d 674, 677-78 (2009) (same); Sheikh v. Buckingham Correctional Center, 264 Va. 558, 566-67, 570 S.E.2d 785, 790 (2002) (applying only the "performance" prong of Strickland test).

Furthermore, petitioner is obliged to allege specific facts sufficient to permit this Court to reach an independent conclusion that he is entitled to relief. Code §§ 8.01-654(B)(2) and 8.01-655. Habeas corpus relief is not warranted where the petition fails to "articulate a factual basis to support [his] claim." Muhammad v. Warden, 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007); cf. Nickerson v. Lee, 971 F.2d 1125, 1135 (4th Cir. 1992) (a "bare allegation" of constitutional error not sufficient for relief).

Applying the Strickland standard of review, the Court finds that Prostell is not entitled to the relief he seeks and an evidentiary hearing is unnecessary.

In claim (I), Prostell alleges that he was denied effective assistance of counsel when counsel failed to present mitigating evidence at trial. Prostell has attached as exhibits to his petition records from the Department of Social Services (DSS). Prostell argues that his life history of abuse as a child by his father, the victim, and foster parents, should have been introduced at trial for the purpose of mitigation.

The Court finds that Prostell has failed to demonstrate that these records would have been admissible during the guilt phase of his trial. In fact, trial counsel did not introduce mitigation evidence because he believed the evidence was not admissible or relevant to his defense. Prostell fails to demonstrate how records decades prior to the date of the offense would have

been relevant. Therefore, Prostell has fails to demonstrate deficient performance at the guilt phase.

The Court also finds that Prostell has also failed to demonstrate deficient performance at sentencing. Prostell advised the Court about his alleged mitigation evidence. Prostell made numerous statements to the Court during his allocution, including that he was abused during his childhood and did not have a good relationship with his father. While Prostell's DSS records he now attaches to his petition where not introduced at trial or at sentencing, the information Prostell alleges should have been investigated and introduced, that he was abused and in foster care throughout his life, was, in fact, presented to the Court as mitigation during the sentencing phase.

Furthermore, a review of the DSS records Prostell attached to his petition indicates he had a lengthy history of disobedience and behavioral problems at home and at school. Introducing the records could also have been detrimental to Prostell. Therefore, presenting such evidence "would have represented a 'two edged sword' that counsel often confront when constructing the strategy most likely to assist rather than harm a client." Shaikh v. Johnson, 276 Va. 537, 548, 666 S.E.2d 325, 330 (2008). Counsel is not ineffective for failing to present evidence that has the potential of being "double-edged." See Prieto v. Warden, 286 Va. 99, 114, 748 S.E.2d 94, 107 (2013) (No duty to present evidence that has the potential to be "double-edged."); see also Moody v. Polk, 408 F.3d 141, 151 (4th Cir. 2005) (same). Such tactical decisions are an area of trial strategy left to the discretion of counsel and should not be second-guessed in a habeas corpus proceeding. See Strickland, 466 U.S. at 689-90. Prostell merely speculates that the records were favorable to his mitigation theory. Therefore, the "double-edge sword" nature of these records is readily apparent. A reasonable trial attorney could have chosen

not to present the records to avoid introduction of the negative information and to subject the defendant to cross-examination of this aspect of his childhood. Therefore, Prostell has failed to demonstrate deficient performance was required by Strickland.

The Court further finds that Prostell has failed to adequately prove Strickland prejudice. Prostell has failed to demonstrate prejudice because he has failed to show but for his counsel's alleged failure the result of the proceeding would have been different. As the Court has found, any abuse decades prior to the petitioner's assault on his father would not have been a defense at trial and Prostell's mitigation argument was presented to the Court at sentencing. The Court finds that there is no reason to believe that additional evidence would have further driven home this uncontroverted point that Prostell was removed from his home and had a difficult childhood. See Moody v. Polk, 408 F.3d 141, 154 (4th Cir. 2005) ("[P]rejudice does not exist simply because more corroborating evidence could have been presented."). Therefore, the Court finds that Prostell has failed to show a probability sufficient to undermine confidence in the outcome of the trial or his sentencing and that there was any likelihood of a different result and his claim should be dismissed.

The petitioner merely speculates a different outcome would have occurred but for counsel's alleged errors. Speculation, however, does not prove prejudice under Strickland. See Burger v. Kemp, 483 U.S. 776, 793 (1987); Orbe v. True, 233 F. Supp. 2d 749, 781 (E.D. Va. 2002). Based on the Court's lengthy pronouncement at sentencing, discussing the grave injuries the petitioner inflicted on his father in an unprovoked attack, the petitioner has failed to demonstrate prejudice as required by Strickland. Therefore, claim (I) is dismissed because petitioner has failed to establish both deficient performance and prejudice as required by Strickland.

In claim (II), Prostell alleges he was denied effective assistance of counsel for not requesting a different judge after he withdrew his guilty plea. Prostell argues he did not receive a fair trial after the judge heard him admit he had done something wrong.

. The Court finds that, based on the record, including trial counsel's affidavit, Prostell fails to show counsel's performance was deficient. Trial counsel did not ask for a different judge because he did not feel that it was necessary. Trial counsel felt the defendant was in a court where he could not have been afforded any greater fairness and was in front of a judge whose reputation is impeccable.

The Court further finds that Prostell fails to show how but for counsel's alleged failure, the result of the proceeding would have been different. Prostell fails to demonstrate how the judge was unfair to him. Moreover, Prostell fails to acknowledge he testified at trial and admitted he struck his father, a sixty-two year old man, in the temple. The evidence at trial was simply overwhelming. Prostell's father had taken a protective order against the petitioner prior to the assault. Prostell struck his father in the temple, a vulnerable area, and the injury was so significant that it resulted in a permanent loss of brain matter and cognitive problems. The Court finds that, based on the evidence of guilt, Prostell fails to show the result of his proceeding would have been different if he was in front of a different trial judge. Therefore, Prostell fails to demonstrate deficient performance and prejudice as required by Strickland and claim (II) is dismissed.

The Court finds the petitioner's allegations can be disposed of on the basis of recorded matters, and no plenary hearing is necessary. Code § 8.01-654(B)(4); Friedline v. Commonwealth, 265 Va. 273, 576 S.E.2d 491 (2003); Yeatts, 249 Va. at 285, 455 S.E.2d at 18.

The Court thus is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore, ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby denied and dismissed.

It is further ORDERED that petitioner's endorsement on this Order is dispensed with pursuant to Rule 1:13 of the Supreme Court of Virginia.

It is further Ordered that the Clerk serve by mail a certified copy of this Order to Carl Prostell, No. 1489352, petitioner, and Lauren C. Campbell, Assistant Attorney General.

This order is final.

Entered this 1 day of July 2017.

Judge

I ask for this:

Lauren C. Campbell
Assistant Attorney General
Virginia State Bar No. 81935
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 692-0584 Phone (804) 371-0151 Fax

A COPY TESTE, Gary S. Anderson, Clerk
Newport News Circuit Court
By: Bernadette [illegible] D.C.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 6th day of October, 2017.

Carl Prostell, Appellant,

against Record No. 170580
Circuit Court No. CL16H01524

Leslie Fleming, Warden, Appellee.

From the Circuit Court of the City of Newport News

Finding that the appeal was not perfected in the manner provided by law because the appellant failed to timely file the notice of appeal, the Court dismisses the petition filed in the above-styled case. Rule 5:9(a).

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: Deputy Clerk

(D)

EXHIBIT
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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 20th day of November, 2017.

Carl Prostell, Appellant,

against Record No. 170580
Circuit Court No. CL16H01524

Leslie Fleming, Warden, Appellee.

Upon a Petition for Rehearing

On consideration of the filing of the appellant, which is treated as a petition to set aside the judgment rendered herein on the 6th day of October, 2017 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

(E)