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DANIEL CARTER *v.* COMMISSIONER OF CORRECTION (AC 44979)

Moll, Cradle and Clark, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with the aggravated sexual assault of the victim, sought a writ of habeas corpus. He alleged that his trial counsel provided ineffective assistance because he failed to investigate certain evidence, namely, tissues containing biological material found at the scene of the alleged crime, and to submit that evidence for DNA analysis, and, but for that deficiency, the jury would have decided differently. The habeas court denied in part the petition, and, on the petitioner's certified appeal to this court, *held*: the habeas court properly denied in part the petition for a writ of habeas corpus, the petitioner having failed to meet his burden under the prejudice prong of the test set forth in *Strickland* v. *Washington* (466 U.S. 668) that, if his trial counsel had submitted the biological material for DNA analysis, there was a reasonable probability that the outcome of his trial would have been different: the record did not support the petitioner's assertion that his theory of mistaken identity would have been bolstered by DNA test results demonstrating that he was not a contributor to the biological material on the tissues because, as the court aptly found, the link between the tissues soiled with fecal matter and the perpetrator, or even the offense, had not been established, and, aside from the victim's testimony as to the petitioner's use of tissues after the assault, there was no evidence presented that the soiled tissues had any connection to the assault, as they did not contain spermatozoa or seminal fluid and did not match the tissues found in the petitioner's vehicle where the assault had taken place; moreover, as the court emphasized, the state's case against the petitioner was not dependent on the tissues and, instead, relied on evidence of the victim's fingerprint on the petitioner's vehicle, a firearm recovered from the petitioner's residence, unaccounted for time during which the petitioner was absent from work, and the victim's identification of the petitioner as the person who sexually assaulted her; furthermore, because the petitioner failed to meet his burden under the prejudice prong of the *Strickland* test, this court did not need to address the petitioner's argument as to the performance prong of that test.

Argued February 6—officially released May 23, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt, J.*; judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, and *Adrienne Russo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Daniel Carter, appeals following the grant of his petition for certification to appeal from the judgment of the habeas court denying in part his petition for a writ of habeas corpus alleging ineffective assistance of counsel. On appeal, the petitioner claims that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing to investigate evidence containing biological material found at the crime scene and to submit that evidence for DNA analysis. We affirm the judgment of the habeas court.

The following facts, as set forth by the habeas court, and procedural history are relevant to the petitioner's claim on appeal. The petitioner was convicted after a jury trial of aggravated sexual assault in the first degree in violation of General Statutes (Rev. to 1995) § 53a-70a (a) (1), attempt to commit aggravated sexual assault in the first degree in violation of General Statutes (Rev. to 1995) §§ 53a-49 (a) (2) and 53a-70a (a) (1), kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), and commission of a class A, B, or C felony with a firearm in violation of General Statutes § 53-202k. The court, *Fracasse*, *J.*, sentenced the petitioner to a total effective sentence of seventy years of incarceration. The judgment of conviction was affirmed. See *State* v. *Carter*, 45 Conn. App. 919, 696 A.2d 1322, cert. denied, 243 Conn. 911, 701 A.2d 334 (1997).

The habeas court, in its memorandum of decision, then set forth portions of this court's decision that summarized the underlying facts in addressing the petitioner's appeal from the denial of a petition for a new trial.[1] "The petitioner's conviction stemmed from a kidnapping and sexual assault that occurred in the early morning hours of May 24, 1995. At the time of the incident, the victim, a self-identified chronic drug abuser, was battling a $300 a day crack cocaine habit. To support her habit, the victim frequently stole and engaged in prostitution. On May 24, 1995, at approximately 2 a.m., the victim left the apartment she shared with her fiancé in the Fair Haven section of New Haven to purchase and smoke crack cocaine. She had last smoked crack cocaine around 1:30 a.m. and was craving more. The victim had walked about four blocks when she saw a man in a burgundy car driving around [her]. She approached the car, and the man, who had his window open, offered her a ride. The area was illuminated by streetlights, and thus she was able to see the man's face. He was a [B]lack male, heavy set, with thick glasses, very short hair, and a little mustache. He said his name was Devon.

"The victim got into the car, and the man agreed to take her to Quinnipiac Avenue. Shortly thereafter, he

said he had to make a quick stop. He stopped the car on Bailey Street, sat back in his seat, and reached down and pulled out a big black gun. The victim heard a clicking noise, which she immediately recognized as the sound of a gun being cocked. The man put the gun to the victim's head and told her that if she did what he said, he would not harm her. He ordered the victim to perform oral sex on him. Fearing for her safety, she did so. After a few minutes, he told the victim to remove her pants. The victim partially disrobed, removing one of her pant legs. The man, still holding the gun to the victim's head, penetrated her vaginally with his penis. He told the victim to turn over, and then he attempted to penetrate her anally. The victim testified that it was hurting so bad, I started to holler and cry real loud. He stopped, told the victim to stop crying, and handed her some tissues from a tissue box on the backseat of the car to wipe her eyes. He then penetrated the victim vaginally a second time and ejaculated inside her. When he had finished assaulting the victim, he got off of her, put the gun down, wiped his penis off with tissues from the backseat, and threw them out of the car window. After he had zipped up his pants, he drove down the street, took a right, and dropped the victim off at the corner at her request. He then backed his car all the way up the street, and left.

"The victim, who had a criminal record and was on probation, did not initially report the incident to the police. Instead, she went home, showered, and went to bed. The next morning, the victim met with her probation officer, Lisa D'Amato, at the Office of Adult Probation in New Haven. As the victim was exiting D'Amato's office, she saw a man in the hallway whom she immediately recognized as the man who had sexually assaulted her. The victim went back into D'Amato's office and told her that she had been raped and that she had just identified the man who had done it. D'Amato contacted the police, and the victim went home, where she was interviewed by Officer Martin D'Adio of the New Haven Police Department. Shortly thereafter, the victim gave D'Adio descriptions of her assailant and his vehicle. She described the vehicle as a red, two door sedan. The victim later identified the petitioner in a showup identification conducted on the street outside of the probation office. The police located the petitioner's vehicle parked on State Street, across from the probation office. The victim accompanied police officers to that location, where she identified the vehicle as that driven by her assailant. The victim told D'Adio that he would find a box of tissues on the backseat of the vehicle. When D'Adio looked inside the vehicle, he confirmed that there was a box of tissues on the backseat. The victim then directed D'Adio to the location where the assault allegedly had taken place. The victim pointed out several tissues soiled with fecal matter lying on the ground, and identified them as the tissues that

the petitioner had used to wipe himself off with following the assault. D'Adio seized the tissues and bagged them as evidence.

"D'Adio then drove the victim to Yale-New Haven Hospital, where she was treated for sexual assault. A forensic examination was performed and biological evidence for a rape kit was collected. The victim reported to attending medical personnel that she had been raped, anally, orally and vaginally, at gunpoint.

"The police later executed a search warrant at the petitioner's home, where they seized a black, semiautomatic handgun and a magazine from the second drawer of a bureau in the bedroom. The petitioner's wife testified that the handgun was in the drawer when the petitioner left for work on the evening of the alleged assault, and that it was still in the drawer at 2 a.m. The petitioner's car also was seized. Detective Christopher Grice testified concerning the forensic investigation of the petitioner's vehicle. Grice testified that he had lifted a latent print from the exterior passenger side door of the vehicle that was consistent with the victim's right thumbprint. Detective Robert Benson also examined the print and confirmed the identification.

"The petitioner agreed to be interviewed by the police. The petitioner stated that he had been working at the Howmet Corporation in North Haven on the morning of the assault. A subsequent check by the police of the petitioner's employment records, however, revealed that he had clocked out of work at 1:44 a.m. on May 24. The petitioner's supervisor at Howmet, Steve Nilsen, related to the police that, on that day, the petitioner had told him that his mother-in-law had died suddenly, and therefore that he was needed at home. Nilsen did not see the petitioner for the remainder of the shift. The police subsequently determined, after speaking with the petitioner's wife, that his mother-in-law was still alive and living in Hartford. When confronted by the police about his employment records—specifically, his recorded 1:44 a.m. departure time—the petitioner maintained that he had been at work for his full shift on May 24, and suggested that he must have forgotten to clock back in after his break. Unprompted, the petitioner further offered that, on the day of the assault, he had had sexual intercourse with an old friend named Charmilla Brooks. He stated that this sexual encounter took place in the front seat of his vehicle at a McDonald's restaurant around 10 a.m. Police investigators were unable to locate a person named Charmilla Brooks.

"Beryl Novitch, a biochemist with the Connecticut Forensic Science Laboratory (laboratory), was called as a defense witness. Novitch testified concerning her examination of the biological samples collected by medical personnel who treated the victim for sexual assault, the soiled tissues collected at the crime scene, and the

tissue box found on the backseat of the petitioner's vehicle. Novitch testified that the tests she performed on these items did not detect the presence of spermatozoa or seminal fluid. She was able to detect the presence of fecal matter on the tissues found at the crime scene. On cross-examination, the prosecutor elicited testimony that the waffle design on the soiled tissues did not match the waffle design on the tissues found in the open tissue box in the petitioner's vehicle. Although the difference in the waffle design was not highlighted for the jury in the state's closing argument, the prosecutor did argue, consistent with D'Adio's testimony, that the soiled tissues at the crime scene had been collected by the police out of prudence, even though it could not be determined whether they had any connection to the assault." (Footnotes omitted; internal quotation marks omitted.) *Carter* v. *State*, 159 Conn. App. 209, 211–16, 122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015).

The habeas court then set forth the following: "[The petitioner] first filed a consent petition for DNA testing of the soiled tissues and, after that DNA testing showed he was not a contributor of DNA to those materials [in 2008 and 2009], filed a petition for a new trial on the basis of newly discovered evidence. See *Carter* v. *State*, Docket No. CV-12-6032165-S, 2013 WL 4504920 (Conn. Super. August 7, 2013). [The petitioner] had request[ed] that the soiled tissues recovered at the crime scene be subjected to DNA testing. Neither the state nor the defense had requested DNA testing in 1995 or 1996. Based on the results of the DNA testing, which excluded the petitioner as a possible contributor of DNA to the biological material on the tissues, the petitioner filed [a] . . . petition for a new trial pursuant to General Statutes § 52-270. His petition was based on a claim of newly discovered evidence, which was supported by allegations that [t]he DNA testing procedures used for casework by the [laboratory] before June 6, 1996, would not have been capable of identifying DNA profiles from the biological material recovered from the tissues. The petitioner further alleged, on that basis, that the results of the DNA testing are newly discovered evidence that was not discoverable or available at the time of the original trial. *Carter* v. *State*, supra, 159 Conn. App. 216–17.

"[The petitioner] presented one witness, Carll Ladd, [a forensic laboratory analyst], in support of his petition for a new trial. Id., 217–21. Ultimately, the court, [*Young*, *J.*] concluded that the petitioner had failed to present evidence that the DNA technology available at the time of his trial could not have been utilized to exclude him as a contributor of DNA to the biological evidence on the soiled tissues, thus foreclosing his claim that the results from the DNA testing performed in 2008 constituted newly discovered evidence under § 52-270. The court thus dismissed the petition for a new trial. . . .

Id., 221. Nevertheless, the court in the alternative addressed the petition for a new trial on its merits, concluding that [the petitioner] had failed to meet three of the four prongs of the applicable test. [See] *Shabazz* v. *State*, 259 Conn. 811, [820–21], 792 A.2d 797 (2002); *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987) (the evidence (1) is newly discovered such that it could not have been discovered previously despite the exercise of due diligence; (2) would be material to the issues on a new trial; (3) is not cumulative; and (4) is likely to produce a different result in the event of a new trial).

"Judge Young noted that the first *Asherman* prong was not satisfied because [t]he court [had] found that DNA testing existed in 1996 which would have yielded the same result as the 2008 and 2009 testing. Therefore, such new testing does not constitute newly discovered evidence. *Carter* v. *State*, supra, 2013 WL 4504920, *[3–4]. Judge Young further noted that two other *Asherman* prongs [had] not been met by the petitioner, that the newly discovered evidence would be material to the issues on a new trial and that it is likely to produce a different result in the event of a new trial. *Asherman* [v. *State*], [supra], 202 Conn. 434. The subject tissues were not recovered by the police from the scene until approximately fifteen hours after the incident had occurred. . . . The [state] specifically did not attempt to utilize these tissues in support of its case and, in closing argument, refuted that the tissues were to be considered by the jury, calling them a red herring.

"[Judge Young further stated that] [t]he petitioner makes much of the fact that there was a presence of fecal material on the tissues. However, the petitioner ignores the [victim's] testimony that the perpetrator was unsuccessful in his attempt at anal rape. Although the petitioner presented the testimony of a social worker that the [victim] told her that she was raped anally, orally and vaginally . . . the [victim] herself testified [that the petitioner] tried to penetrate [her] anus. . . . The [victim] informed the physician who interviewed her prior to conducting the rape examination that her rectum was not penetrated. The investigating officer described the tissues as very soiled with feces. Furthermore, the forensic examiner in the underlying trial testified that the tissues which had fecal material on them contained no sperm and did not match the tissues in the tissue box recovered from the petitioner's car. Cumulatively, the testimony was that the [victim] was not anally penetrated, and that the recovered tissues did not match the tissues in the tissue box recovered from the petitioner's car, had a substantial amount of fecal material and there was no presence of semen on them. As there was no evidence elicited in the underlying trial which tied the tissues to the crime, it is irrelevant that the petitioner was excluded as a source of the biological material contained in the tissues. . . .

[See] *Carter* v. *State*, supra, 2013 WL 4504920, *[4].

"The Appellate Court noted that [the petitioner] alleged that the DNA evidence was newly discovered on the ground that it could not have been obtained using the technology that was available in 1995 and 1996. Ladd, however, debunked that proposition entirely, and the petitioner presented no other evidence from which the trier of fact could have drawn an inference to the contrary. [*Carter* v. *State*, supra, 159 Conn. App.] 226." (Emphasis omitted; footnotes omitted; internal quotation marks omitted.)

On November 23, 2015, the petitioner filed a petition for a writ of habeas corpus and requested that the court appoint him counsel. After the petitioner was appointed counsel, he filed an amended petition on February 26, 2019, in which he claimed both ineffective assistance of his trial counsel, Attorney Earl Williams, and a violation of his due process rights as to the conviction for kidnapping in the first degree.[2] The petitioner alleged, inter alia, that Williams' representation was deficient because he failed to investigate evidence containing biological material found at the crime scene and to submit that evidence for DNA analysis, and, but for that deficiency, the jury would have decided differently.[3] The petitioner's claims were tried before the habeas court, *Bhatt*, *J.*, on February 25, 2020, and February 9, 2021. On July 30, 2021, the habeas court issued its memorandum of decision denying in part and granting in part the petitioner's petition for a writ of habeas corpus.[4]

In its memorandum of decision, the habeas court recounted that, "[a]t the habeas trial, [the petitioner] again presented the testimony of [Ladd], as well as that of his expert witness, Attorney Frank Riccio II. According to Ladd, DNA testing was available in 1992 on a very limited basis, but steadily increased with time, so that by 1995 such testing was more available. Ladd became involved in the present case in either 2008 or 2009, when he was the technical reviewer of the DNA reports done pursuant to the request for DNA testing in conjunction with the petition for a new trial. [The petitioner] was eliminated as a DNA source or contributor to all samples tested—four tissue samples, one genital swab. The fecal matter on the recovered tissues, which were collected in 1995, but not tested in 2009, had human DNA present. However, that DNA was degraded.

"Riccio testified about the standard of care for defense counsel in sexual assault cases that involve DNA. According to Riccio, the standard of care is for counsel to have available evidence tested to determine if tested DNA belongs to a client or another individual. Riccio conceded that such testing runs the risk of confirming a client's DNA is in a sample and that defense counsel is stuck with the results if they do not favor the client. Conversely, if the DNA results confirm that

a client is not a contributor to tested samples, then that is helpful to the defense. Riccio also acknowledged that it would be reasonable for defense counsel to forgo DNA testing after consulting with a client and obtaining the client's consent to not request DNA testing, but that counsel must have such testing performed if the client persists."

The habeas court further noted that "Williams represented the petitioner at all times relevant" to the petitioner's ineffective assistance of counsel claim and is now deceased. Moreover, "the record does not reflect that [Williams] ever testified in any proceeding." The habeas court found that "[i]t is unknown and unknowable if Williams considered DNA testing and, if he did consider it, why it was not requested."

The habeas court denied the petitioner's petition as to his claim of ineffective assistance of counsel because it concluded that the petitioner failed to prove that Williams' representation of him was deficient and that he was prejudiced by that alleged deficiency, as required under the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The habeas court thereafter granted certification to appeal, and this appeal followed.

We begin our analysis by setting forth the standard of review and relevant legal principles. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 212, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). "[W]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the *Strickland* test, when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of the *Strickland* test, failure to satisfy either prong is fatal to a habeas petition. . . .

"To satisfy the first prong, that his counsel's performance was deficient, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all

of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Furthermore, the right to counsel is not the right to perfect counsel." (Citations omitted; internal quotation marks omitted.) Id., 212–13.

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Lance W.* v. *Commissioner of Correction*, 204 Conn. App. 346, 355, 251 A.3d 619, cert. denied, 337 Conn. 902, 252 A.3d 363 (2021). "In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 369, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

The habeas court denied the petitioner's petition on the grounds that he failed to satisfy both the performance prong and the prejudice prong. On appeal, the petitioner challenges the habeas court's conclusions as to both prongs. Because we agree with the habeas court that the petitioner failed to meet his burden under the prejudice prong of the *Strickland* test, we need not address the petitioner's argument as to the performance prong. See *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 857, 257 A.3d 343 ("[a]lthough a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against the petitioner on either ground" (internal quotation marks omitted)), cert. denied, 339 Conn. 905, 260 A.3d 484 (2021).

In its memorandum of decision, the habeas court concluded that the petitioner failed to meet his burden under the prejudice prong, finding that "[t]he state's case was based on identification and other evidence such as the [victim's] print on [the petitioner's] vehicle, the firearm recovered from his residence, and the unaccounted time [the petitioner] was absent from work with his disproven explanation." The habeas court determined, based on the evidence that was before the jury, that "[the petitioner] has not undermined this court's confidence in the outcome of the jury trial."

Although the petitioner does not challenge any of the habeas court's findings of fact, he nevertheless argues that Williams' failure to have the tissues containing

biological material DNA tested was prejudicial because the victim's "identification of the petitioner was the central issue in his trial and . . . the lack of forensic evidence exculpating the petitioner was a major theme in the state's case." The record does not support the petitioner's assertion that his theory of mistaken identity would have been bolstered by DNA test results demonstrating that he was not a contributor to the biological material on the tissues found at the crime scene because, as the habeas court aptly found, the link between the tissues and the perpetrator—or even the offense—had not been established. Aside from the victim's testimony as to the petitioner's use of tissues after the assault, there was no evidence presented that the tissues found at the crime scene had any connection to the assault—they did not contain spermatozoa or seminal fluid and did not match the tissues found in the petitioner's car. Further, as the habeas court emphasized, the state's case against the petitioner was not dependent on the tissues,[5] and instead relied on evidence of the victim's fingerprint on the petitioner's vehicle, the firearm recovered from the petitioner's residence, the unaccounted for time during which the petitioner was absent from work, and the victim's identification of the petitioner as the person who sexually assaulted her. On the basis of the foregoing, the habeas court properly concluded that the petitioner failed to demonstrate that, if Williams had submitted the biological material for DNA analysis, there is a reasonable probability that the outcome of the petitioner's trial would have been different. Accordingly, the court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The petition for a new trial was based on the discovery of the same DNA evidence at issue in the present appeal. See *Carter* v. *State*, 159 Conn. App. 209, 210–11, 122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015).

[2] The parties stipulated that the petitioner's habeas petition, as to his due process claim under *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)—alleging that the restraint underlying his kidnapping conviction was incidental to the restraint necessary to commit sexual assault in the first degree—should be granted. The habeas court accordingly granted the petition, in part, as to the petitioner's due process claim. Resultantly, the habeas court vacated the petitioner's kidnapping conviction, and remanded the matter to the trial court for further proceedings. The due process issue is not a subject of this appeal.

[3] The petitioner also alleged that his trial counsel was ineffective insofar as he failed to file a motion to correct an illegal sentence. On appeal, the petitioner does not challenge the habeas court's rejection of this claim. Consequently, our review is limited to the petitioner's claim that Williams was ineffective for failing to investigate the tissues containing biological material found at the crime scene and to submit the biological material for DNA analysis.

[4] See footnote 2 of this opinion.

[5] During closing arguments in the underlying criminal trial, the state disavowed any reliance on the tissues collected from the crime scene.