For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DARYL BLYDEN, Appellant/Petitioner, v. **GOVERNMENT OF THE VIRGIN ISLANDS; ALBERT BRYAN, JR, GOVERNOR; DENISE N. GEORGE, ATTORNEY GENERAL; WYNNIE TESTAMARK, DIRECTOR, VIRGIN ISLANDS BUREAU OF CORRECTIONS; JOE BOOKER, WARDEN, GOLDEN GROVE CORRECTIONAL FACILITY; HAROLD W. CLARKE DIRECTOR WALLENS RIDGE STATE PRISON; CARL MANIS, WARDEN, WALLENS RIDGE STATE PRISON,** Appellees/Respondents.	**S. Ct. Civ. No. 2019-0067** Re: Super. Ct. Civ. No. 327/2013 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Harold W.L. Willocks

Argued: June 14, 2022
Filed: August 8, 2022

Cite as: 2022 VI 15

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **JAMES S. CARROLL III**, Designated Justice.[1]

APPEARANCES:

Yohana M. Manning, Esq.
Manning Legal Services PC
St. Croix, U.S.V.I.
Attorney for Appellant,

Aysha Gregory, Esq.
Ian S. A. Clement, Esq. (Argued)
Assistant Attorney General

[1] The Honorable Ive Arlington Swan is recused from this matter. The Honorable James S. Carroll III sits in his place by designation pursuant to title 4, section 24 of the Virgin Islands Code.

St. Thomas, U.S.V.I.
Attorneys for Appellees.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Daryl Blyden appeals from the Superior Court's July 31, 2019 opinion and order, in which it declined to provide him with a new trial or other post-conviction relief.[2] We affirm.

I. BACKGROUND

¶ 2 A jury found Blyden guilty of numerous offenses in relation to a fatal shooting on St. Thomas in 2005, and this Court affirmed all but one of those convictions on direct appeal. *See Blyden v. People*, 53 V.I. 637 (V.I. 2010). Blyden filed a petition for writ of habeas corpus with the Superior Court on December 11, 2013, which the Superior Court summarily denied without a hearing in a June 21, 2014 opinion. Blyden appealed that decision to this Court, which held that the Superior Court correctly denied two claims in his habeas petition as procedurally barred but erred by rejecting two of his claims—asserting ineffective assistance of his trial counsel, Julie Smith Todman, Esq., and claiming that the People intentionally fabricated evidence—without an evidentiary hearing. *See Blyden v. Gov't of the V.I.,* 64 V.I. 367 (V.I. 2016).

¶ 3 On remand, the Superior Court held an evidentiary hearing on those two remaining claims

[2] In their briefs, the parties repeatedly refer to the Superior Court as having denied Blyden's habeas corpus petition. But as this Court previously explained, "the writ of habeas corpus . . . constitutes an intermediate step in the statutory procedure," with the Superior Court required to grant a petition for writ of habeas corpus upon determining that it states a prima facie case for relief. *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 312 (V.I. 2014). Thus "the writ alone does not entitle [a petitioner] to the ultimate relief he is seeking in his petition," but rather triggers the statutory procedure in which the Government files its return, the petitioner files the traverse, and the Superior Court holds a hearing on the claims. *Id.* Since the Superior Court only rejected Blyden's claims after holding such a hearing, the Superior Court did not deny his habeas corpus petition, but rather had granted the petition and subsequently denied his request for post-conviction relief.

on May 11, 2017. At the hearing, the Superior Court heard testimony from numerous witnesses, and permitted the parties to file supplemental briefs if they elected to do so. Ultimately, the Superior Court issued its July 31, 2019 opinion and order holding that Blyden was not entitled to post-conviction relief. Blyden timely filed a notice of appeal with this Court on August 26, 2019. *See* V.I. R. APP. P. 4(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 4 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's July 31, 2019 opinion and order resolved all of the claims between the parties, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012); *see also* 48 U.S.C. § 1613a(d).

¶ 5 This Court exercises plenary review over all questions of law, and reviews factual findings only for clear error. *Brathwaite v. People*, 60 V.I. 419, 426 (V.I 2014).

B. Denial of Post-Conviction Relief

¶ 6 On appeal, Blyden contends that the Superior Court erred when it refused to order a new trial or otherwise provide him with post-conviction relief based on the arguments made in his habeas corpus petition and developed at the May 11, 2017 evidentiary hearing. We address each claim in turn.

1. Ineffective Assistance of Trial Counsel

¶ 7 As this Court has previously explained,

> The Sixth Amendment guarantees a right to effective counsel. The landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984) outlines the standard that must be applied for an ineffective assistance of counsel claim to be established. First, [the petitioner] must identify acts or omissions of counsel that are alleged to have been outside the wide range of reasonable professional judgment and competent assistance. *Id.* at 690. Second, [the 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." *Id.* at 694.

Morton v. People, 59 V.I. 660, 669 (V.I. 2013). Blyden alleges that Attorney Todman provided him with ineffective assistance of counsel when she purportedly failed to introduce evidence that, according to Blyden, indicates that the firearm introduced into evidence at his trial was not the same one that had been seized by the arresting officer, Joel Dowdye. Specifically, Blyden maintains that Attorney Todman had been aware that (1) the original police report prepared when Blyden had been arrested identified a serial number that is not present on the firearm—a .38 Taurus revolver—introduced at trial and (2) Dowdye executed an affidavit prior to trial stating that he had not seized a .38 Taurus revolver from Blyden, yet she did not call Dowdye as a witness or seek to introduce his affidavit into evidence.[3]

¶ 8 As a threshold matter, it is important to recognize that Attorney Todman did not testify at the May 11, 2017 evidentiary hearing, and that there is no indication whatsoever that Blyden

[3] For the first time on appeal, Blyden asserts a third claim: that Attorney Todman allegedly failed to recognize that Count 5 of the information, charging first-degree assault, had been previously dismissed at a probable cause hearing yet remained on the information and was presented to the jury anyway, resulting in a conviction. Because Blyden has raised this claim for the first time in his appellate brief, it was certainly not fairly presented to the Superior Court. *See* V.I. R. APP. P. 22(m). While this Court has on one previous occasion granted relief in a habeas appeal based on a claim not presented to the Superior Court, in that case this Court relied on the fact that the Government not only "waived waiver" but had in the fact expressly conceded that an error occurred, and that relief should be granted. *See Bryan v. Gov't of the V.I.*, 56 V.I. 451, 457 (V.I. 2012). In this case, the Government has both expressly invoked the waiver doctrine and has not conceded that an error occurred. (Appellee's Br. 16.) Consequently, we deem the issue waived and will not consider it for the first time on appeal without the benefit of reasoned argument.

attempted to procure her testimony by subpoena or otherwise. That Attorney Todman did not testify is highly significant because "[i]n making a case for ineffective assistance of counsel, the [petitioner] has the burden of overcoming the presumption that the allegedly defective performance was part of a sound trial strategy." *Francis v. People*, 57 V.I. 201, 238 (V.I. 2012) (citing *Strickland*, 466 U.S. at 689-90). Because a court must presume that trial counsel acted within his or her reasonable professional judgment, and the habeas petitioner bears the burden of rebutting that presumption, a petitioner who chooses not to call trial counsel as a witness at an evidentiary hearing will, as a practical matter, almost never overcome this presumption. *Wilson v. State*, 586 S.E.2d 669, 673 (Ga. 2003).

¶ 9 Here, Blyden has failed to establish that Attorney Todman did not exercise her reasonable professional judgment. While Blyden faults Attorney Todman for failing to call Dowdye as a witness at trial, he fails to acknowledge that Dowdye had been called as a witness by the prosecution near the conclusion of its case-in-chief and refused to testify even when threatened with contempt, resulting in the trial judge declaring him unavailable and permitting his full testimony from an earlier pre-trial suppression hearing to be read into the record. *See Blyden*, 53 V.I. at 645. Blyden fails to explain how Attorney Todman attempting to call Dowdye as a defense witness, after he had already been declared unavailable by the judge after his express refusal to testify earlier at that very same trial, resulting in the judge declaring him unavailable, would have been anything other than a frivolous or futile act, let alone somehow result in him providing live testimony that would benefit the defense. Moreover, the record reflects that Attorney Todman did in fact cross-examine a different prosecution witness—Corporal Pierre Bedminster—on the serial number discrepancy, and that the jury was therefore aware that two inconsistent reports had been prepared by the police.

¶ 10 Likewise, Blyden has failed to meet his burden of establishing that Attorney Todman failed to exercise reasonable professional judgment when she did not attempt to introduce Dowdye's affidavit into evidence. Because Blyden did not call Attorney Todman as a witness at the evidentiary hearing, we do not know why she did not do so. As the Superior Court correctly noted in its October 31, 2019 opinion, there is a high possibility that Attorney Todman believed the affidavit to be false or otherwise not credible. Not only had this affidavit been prepared by Dowdye while he was incarcerated for first-degree murder, it also represented Dowdye's fourth version of events. In the original police report he stated that he recovered a revolver, later executing an affidavit that he recovered a black automatic handgun, and testifying at the suppression hearing that he did not remember the kind of gun recovered. Attorney Todman could certainly have concluded that she could not introduce the affidavit while complying with then-applicable rules of professional conduct. *See* AM. BAR ASS'N MODEL R. PROF'L COND. 3.3(a)(3) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."). And even if Attorney Todman did not conclude that the statements in the affidavit were false, she could certainly have determined that the jury would not view the affidavit as credible, that introducing it would reflect poorly on the defense, or that she could persuade the jury that the firearm introduced into evidence had not been Blyden's firearm through other, more reliable, evidence.

¶ 11 Perhaps more importantly, however, is that Dowdye's affidavit did not meet the standards for admission as evidence at trial. Blyden maintains that Attorney Todman could have admitted the affidavit into evidence pursuant to title 14, section 19 of the Virgin Islands Code, which had been operative during Blyden's trial and permitted the introduction of prior inconsistent statements as substantive evidence under certain circumstances. That statute provided, in its entirety, that

> Evidence of a prior statement, oral or written, made by a witness is not made

> inadmissible by the hearsay rule if the prior statement is inconsistent with his testimony at a hearing or trial. After the witness has been given an opportunity at such hearing or trial to explain or deny the prior statement, the court shall allow either party to prove that the witness has made a prior statement, oral or written, inconsistent with his sworn testimony. Such prior statement shall be admissible for the purpose of affecting the credibility of the witness or for proving the truth of the matter asserted therein if it would have been admissible if made by the witness at the hearing or trial. Each party shall be allowed to cross-examine the witness on the subject matter of his current testimony and the prior statement.

But Dowdye's affidavit cannot be inconsistent with his testimony at Blyden's trial, given that he did not testify at that trial. And while the Superior Court read Dowdye's testimony from the prior suppression hearing into the record, Dowdye had not been "given an opportunity at such hearing or trial to explain or deny the prior statement." Consequently, the affidavit would not have been admissible under section 19 even if Attorney Todman had attempted to introduce it into evidence.

¶ 12 But even if we were to assume, *arguendo*, that Attorney Todman somehow failed to exercise reasonable professional judgment, Blyden has failed to establish that there is a reasonable probability that the result of the proceeding would have been different. As this Court noted in its opinion on Blyden's direct appeal, "the People presented . . . overwhelming evidence of Blyden's guilt, including ample physical and testimonial evidence," including highly inculpatory statements from Blyden himself. *Blyden*, 53 V.I. at 663-64 & n.21. And as noted above, the jury had heard other evidence through which it became aware of both the inconsistent firearm serial numbers on the two police reports as well as Dowdye's statement that he had not recovered a .38 Taurus revolver from Blyden. Consequently, even if Attorney Todman managed to somehow get Dowdye to testify or to admit his affidavit as substantive evidence at trial, this evidence would—at best—have been cumulative of other evidence the jury had already heard. Accordingly, the Superior Court committed no error when it held that Blyden was not entitled to a new trial on his ineffective assistance of counsel claim.

2. Fabrication of Evidence

¶ 13 Blyden further renews his argument that the prosecution procured his conviction by intentionally fabricating evidence, to wit, by introducing a firearm at trial that was allegedly not the same firearm seized from his person on the night of his arrest. As this Court acknowledged in its opinion on Blyden's direct appeal, at trial the prosecution had "presented ample evidence concerning the weight the jury should give to the firearm offered into evidence, including expert testimony that the firearm admitted at trial matched bullets and casings recovered from the crime scene and the bodies of the shooting victims," and while Attorney Todman similarly had "amply expressed to the jury that the People had failed to connect the firearm to Blyden," ultimately "the jury clearly chose to believe the People's evidence concerning the authenticity of the firearm and convicted Blyden of all counts related to the firearm." 53 V.I. at 659-60. Nevertheless, in this Court's opinion reversing the Superior Court's initial denial of Blyden's habeas corpus petition, we emphasized that Blyden's fabrication argument was not procedurally barred because he alleged intentional fabrication and had gone the "extra mile" by "submitting an affidavit from Dowdye in support of his claims." 64 V.I. at 380.

¶ 14 In its July 31, 2019 opinion, the Superior Court considered not just Dowdye's affidavit, but also Dowdye's testimony at the May 11, 2017 evidentiary hearing. The Superior Court concluded that Dowdye was not a credible witness, emphasizing that he "has changed his story four times over fourteen years," and had not provided reliable testimony to support Blyden's claim that the prosecution intentionally fabricated evidence. Importantly, this Court's review of this credibility determination is only for clear error—"a very deferential standard" in which this Court "should only reverse a factual determination as being clearly erroneous if it is completely devoid of minimum evidentiary support or bears no rational relationship to the supportive evidentiary data."

Rainey v. Herman, 55 V.I. 875, 880 (V.I. 2011) (quoting *Hodge v. McGowan*, 50 V.I. 296, 316 (V.I. 2008)). Significantly, at no point in his brief does Blyden even allege that the Superior Court committed clear error by rejecting Dowdye's testimony. Rather, Blyden simply asserts that the "totality of circumstances" establishes fabrication. (Appellant's Br. 19.) These circumstances, however, formed the basis of precisely the same arguments that had been presented to the jury in Blyden's trial, and those arguments were clearly rejected by that jury. Accordingly, the Superior Court committed no error when it declined to award Blyden with a new trial or other postconviction relief based on his claim that the prosecution had relied on purportedly fabricated evidence at his trial.

III. CONCLUSION

¶ 15 Blyden failed to establish that his trial counsel provided him with the ineffective assistance of counsel, or that the prosecution relied on fabricated evidence to procure his convictions. Thus, the Superior Court committed no error when it denied Blyden's request for postconviction relief. Accordingly, we affirm the Superior Court's July 31, 2019 opinion and order.

Dated this 8th day of August, 2022.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk II

Dated: August 8, 2022