In the

United States Court of Appeals

For the Seventh Circuit

No. 23-1552

ANTHONY D. LEE, SR.,

Petitioner-Appellant,

v.

DARREN GALLOWAY, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:11-cv-00183 — **Martha M. Pacold**, *Judge*.

ARGUED FEBRUARY 22, 2024 — DECIDED JULY 8, 2024

Before EASTERBROOK, SCUDDER, and KIRSCH, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Following multiple convictions and a 100-year sentence for horrific sexual assaults and aggravated kidnapping, Anthony Lee's quest for postconviction relief returns. In 2018 we remanded the case to the district court for an evidentiary hearing regarding defense counsel's diligence in investigating five potential witnesses who purportedly prepared affidavits before trial and may have offered exculpatory testimony. The district court held a

three-day hearing and, in a lengthy and detailed order, determined that Lee failed to carry his burden of establishing a Sixth Amendment violation under the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). We affirm.

I

A

The facts of this case have been exhaustively cataloged through multiple rounds of postconviction litigation. See *People v. Lee*, 57 N.E.3d 686 (Ill. App. Ct. 2016); *Lee v. Lamb*, No. 11-cv-183, 2017 WL 5989775 (N.D. Ill. Dec. 4, 2017); *Lee v. Kink*, 922 F.3d 772 (7th Cir. 2019); *Lee v. Galloway*, 11-cv-183, 2023 WL 2241974 (N.D. Ill. Feb. 27, 2023). A summary suffices here.

In 1996 Anthony Lee was convicted of aggravated kidnapping and aggravated sexual assault after a bench trial in Cook County Circuit Court. The state's primary witness, a woman identified as L.M., testified that she encountered Lee and his codefendant Burlmon Manley while walking alone down a street in Calumet City, Illinois around 1:00 a.m. on April 15, 1995. According to L.M., Lee and Manley seized her, forced her into their Cadillac, and proceeded to beat and rape her repeatedly over the course of two hours.

To corroborate L.M.'s testimony, the state introduced photographs of her severe injuries shortly after the incident. The state also called Teresa Baragas, a Chicago resident who recalled waking up at 3:00 a.m. on April 15 only to find L.M. on her doorstep—naked, battered, and screaming that she had just been raped.

Lee chose to testify in his own defense. He stated that L.M. entered his car voluntarily to join Lee and Manley for drinks and drove with them to a liquor lounge in Hammond,

Indiana. Lee and Manley went inside to buy alcohol, leaving L.M. alone with the keys to the car. After leaving the liquor lounge, Lee testified that he, Manley, and L.M. made another quick stop at L.M.'s house to drop off her CD player. They later drove to Merrill Park in Chicago, where they drank and smoked marijuana and cigarettes. L.M. extinguished a cigarette on Lee's car floor, prompting him to yell at her. A brief physical fight ensued. Lee then exited the car and waited outside. Meanwhile, Manley and L.M. engaged in what Lee believed to be consensual sex in the back seat. When Lee returned, L.M. lay naked and silent in the back. After Lee dropped Manley off, L.M. hit Lee, exited without her clothing, and shouted that he and Manley were "going to pay for this."

Lee's testimony differed notably from a written statement he provided law enforcement shortly after his arrest. In that statement—which the state read into evidence—Lee claimed that he had stayed in the car with L.M. while Manley bought alcohol, that Lee subsequently observed Manley and L.M. having sex when Lee returned to his vehicle at Merrill Park, that Lee offered cocaine to L.M. in exchange for oral sex, and that L.M. hit him and stormed away after he accidentally urinated in her mouth. Addressing these discrepancies, Lee testified that law enforcement officers had typed the statement themselves and instructed him to sign after reading only "about four lines."

The trial court found Lee guilty of five counts of aggravated sexual assault (three as a perpetrator and two as an accomplice to Manley) and one count of aggravated kidnapping. The court explained that in its view "[t]he case [came] down to credibility" and L.M. was simply more credible than

Lee in light of the photographs documenting her injuries. The court sentenced Lee to 100 years' imprisonment.

B

In time Lee filed a motion for postconviction relief in the state trial court, alleging ineffective assistance of counsel. He argued that his attorney, Richard Friedman, had performed inadequately by failing to interview several potential witnesses who had volunteered to testify as defense witnesses. That failure, Lee contended, deprived him of a critical opportunity to corroborate his testimony and may well have changed the trial outcome.

Lee supported his motion with six affidavits that he claimed Friedman had ignored. The first two came from Byron and Gayland Massenburg, brothers who allegedly saw a white woman enter a Cadillac driven by two men late at night when their car broke down on the same block where Lee encountered L.M. (L.M. was white.) The next, signed by Charlene Parker, stated that Lee, Manley, and a third person had spent time together at Dad's Liquor Lounge in Hammond on the night in question. In the fourth, Gaila Pinkston described a phone call where Manley admitted that Lee was "nowhere around" when he had sex with L.M. Even so, Manley threatened to "take Anthony [Lee] down with him" if he went "down on this case." The fifth and sixth affidavits both belonged to Phillip Elston, a friend of Lee's who claimed to have seen Lee sitting on a curb at Merrill Park while a man and woman had sex in his car.

After reviewing the affidavits, the trial court denied Lee's ineffective-assistance claim, and the Illinois Appellate Court affirmed. The appellate court reasoned that even if Friedman

had neglected to interview the witnesses who submitted affidavits, that failure had not meaningfully hurt Lee's defense. The court emphasized that, given the strength of the state's case against Lee and the fact that no affidavit contradicted L.M.'s account of the night in question, there was no "reasonable probability" that testimony from the five witnesses would have changed the outcome. The Illinois Supreme Court declined review.

Lee then turned to federal court and sought relief under 28 U.S.C. § 2254. The district court denied his petition, explaining that, although the decision of the Illinois Appellate Court was "perhaps not the result this Court would reach on a blank slate," it was not so deficient as to be "contrary to, or [] an unreasonable application of, clearly established Federal law" or an "unreasonable determination of the facts in light of the evidence"—the standard for granting a habeas petition under § 2254(d). See *Lee v. Lamb*, No. 11-cv-183, 2017 WL 5989775, at *5 (N.D. Ill. Dec. 4, 2017).

We took a different view on appeal. See *Lee v. Kink*, 922 F.3d 772 (7th Cir. 2019). What troubled us was the fact that the state court had based its prejudice analysis on the flawed assumption that each witness would have merely "parroted their affidavits and refused to say another word" if called to testify. *Id.* at 774. In reality, we explained, the witnesses likely would have elaborated upon their written statements, filling in details in ways that could have strengthened Lee's defense.

To assess the impact the witnesses might have had on Lee's trial, we determined that it was necessary to hear from the witnesses themselves. Supplemental briefing revealed that Lee had repeatedly requested an evidentiary hearing to do just that. In the final analysis, then, we concluded that the

state court's denial of the hearing requests had prohibited Lee from making the factual showing needed to demonstrate prejudice. This, we determined, had resulted in "a decision [] based on an unreasonable determination of the facts in light of the evidence," which justified relief under § 2254(d)(2). See *id.* at 775. So we vacated and remanded to allow the district court to hold an evidentiary hearing on Lee's claim.

C

A three-day hearing followed in early 2020. The district court received testimony from Lee, Friedman, multiple investigators, notaries, and two of the five affiant-witnesses: Byron Massenburg and Gaila Pinkston. Two other witnesses, Charlene Parker and Gayland Massenburg, had died in the years following the trial. The fifth, Phillip Elston, could not be located.

For his part, Lee testified that Friedman had neglected his defense. Lee claimed that Friedman had rarely visited him, refused to discuss trial strategy, and ignored multiple affidavits supplied by witnesses offering to testify in Lee's defense. Lee asserted that he had asked Friedman about the affidavits several times only to hear Friedman dismiss them because he was "too busy." On the eve of trial, Friedman allegedly instructed Lee "not to mention anything that was in [an] affidavit or anything about the witnesses at all" while on the stand because Friedman had not had the time to contact the witnesses.

Friedman's provided an altogether different account. He explained that he and Lee had shared a "good working relationship" and discussed a wide variety of issues, including whether to call witnesses. Friedman told the district court that

his general practice "would have" been to try to contact potential witnesses, especially after receiving affidavits in a pending trial. At one point, Friedman was asked about a brief pretrial hearing during which he requested a deadline extension to "meet with" "several witnesses who have contacted me about testifying on behalf of Mr. Lee." Although he did not recall the hearing, Friedman insisted that he would not have requested an extension to investigate witnesses without actually doing so. And Friedman was most adamant that he would not have neglected a potential witness because he was too busy or instructed Lee to omit references to a witness to cover up his failure to investigate.

At the same time, Friedman acknowledged that his memory of Lee's decades-old case was limited. He could not remember, for example, whether he received affidavits from the various witnesses. And, if he had, Friedman could not say for certain whether he conducted follow-up interviews or otherwise investigated potential witnesses.

Byron Massenburg also testified at the hearing. Massenburg stated that he did not recall ever speaking with Friedman. Going further, Massenburg denied even writing the affidavit that had been attributed to him and declared that its contents were "not accurate." He added that the signature on the affidavit read "Brian" but his legal name, which he used on all documents, was "Byron." He also insisted that he never saw the events described in the affidavit, that he had "[n]o personal knowledge whatsoever" about the events leading to Lee's arrest, and that, had he been called as a witness, he would have testified that the affidavit was false.

Gaila Pinkston testified next. She confirmed that the signature on the affidavit was her own but did not remember

signing it. Pinkston speculated that someone else must have prepared the affidavit for her because she could not type well. She also stated that she could not recall speaking with Friedman about her affidavit. Nor did she have any memory of the phone conversation with Manley that the affidavit described.

After reviewing the evidence in the record, including the new testimony from the 2020 evidentiary hearing, the district court again denied Lee's § 2254 petition. Applying the two-pronged test articulated in *Strickland v. Washington*, the district court concluded that Lee failed to establish that Friedman's performance fell below an objective standard of professional competence. Alternatively, the district court concluded that any errors Friedman might have committed did not meaningfully compromise Lee's defense given the strength of the state's case.

Lee now appeals.

II

Under 28 U.S.C. § 2254(d), we must affirm the state court's judgment unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." We have already held that the Illinois Appellate Court's decision to deny Lee's request for postconviction relief without an evidentiary hearing was "based on an unreasonable determination of the facts" and thus "lack[ed] the shelter of § 2254(d) as a whole." *Kink*, 922 F.3d at 775. Consistent with that determination, we conduct our own independent review of Lee's

ineffective-assistance claim without deference to the state court. In doing so, we accept the district court's factual findings on remand unless "after reviewing the complete record, we are left with the definite and firm conviction that a mistake has been committed." *Holleman v. Cotton*, 301 F.3d 737, 741–42 (7th Cir. 2002) (citation and internal quotation marks omitted).

To establish a Sixth Amendment violation on the basis of ineffective assistance, Lee bears a twofold burden. He must demonstrate that Friedman's performance as his trial counsel "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 668. He also must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.*

A

We have flexibility in how we approach these inquiries. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. Indeed, the Supreme Court has counseled that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, … that course should be followed." *Id.* This guidance is especially applicable here.

After a careful and exhaustive review, the district court concluded that the evidentiary record remained "too thin and inconclusive" to determine whether Richard Friedman had in fact interviewed or otherwise investigated the witnesses who submitted affidavits. That finding finds ample support in the

record. By the time of the evidentiary hearing—nearly 25 years after Lee's trial—Lee's case file could not be located, Friedman's recollections were understandably hazy, three of the five witnesses were unavailable to testify, another had no memory of whether she spoke with Friedman, and a fifth denied writing an affidavit at all. These evidentiary uncertainties make any assessment of Friedman's performance challenging and probably explain why, in the end, the district court resolved this prong of the *Strickland* inquiry by indicating that, given the passage of time and Friedman's credible testimony contradicting Lee's accusations, the evidence was too indeterminate for Lee to carry his burden of demonstrating unreasonable performance.

While it is hard to find fault with district court's approach, it seems more prudent in the circumstances to proceed to *Strickland*'s prejudice prong, as the analysis on that front is open-and-shut.

B

As a threshold matter, Lee claims that he does not need to establish prejudice. Citing the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), Lee emphasizes that prejudice under *Strickland* is presumed if the accused is "denied counsel at a critical stage of his trial" or his counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659; see also *Garza v. Idaho*, 586 U.S. 232, 237 (2019). Lee insists that Friedman's errors amounted to a total failure to meaningfully contest the prosecution's case against him and a total absence during the critical pretrial phase of his case, obviating any need for him to show prejudice.

We have little trouble rejecting this contention. *Cronic* recognized a "narrow exception" to *Strickland*'s prejudice requirement, see *Florida v. Nixon*, 543 U.S. 175, 190 (2004), that applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658. The record falls well short of permitting a conclusion that Friedman completely abandoned Lee, failed to conduct any pretrial investigation, or neglected his duty to present a defense. See *Patrasso v. Nelson*, 121 F.3d 297, 304–05 (7th Cir. 1997) (presuming prejudice under *Cronic* where counsel "effectively abandoned his client" at sentencing, "made no effort to contradict the prosecution's case or to seek out mitigating factors," and "barely spoke with his client and performed no investigation"). This is not a *Cronic* case: Lee must show prejudice under *Strickland*.

C

Strickland requires that Lee establish a "reasonable probability" that the result of his trial would have been different had Friedman not committed professional errors. See *Strickland*, 466 U.S. at 694. That probability must be high enough to "undermine confidence in the outcome." *Id.*

The record before us provides little indication that testimony from some or all of the affiant-witnesses would have had a meaningful impact on Lee's case, much less undermine our confidence in the verdict. At best, the additional testimony would have done nothing to counter the evidence of L.M.'s severe injuries and hysterical behavior immediately after the incident—evidence for which Lee never provided a plausible explanation. At worst, additional testimony from the witnesses may have ultimately weakened

Lee's defense by contradicting his testimony or their own affidavits.

At a basic level, none of the affidavits provided an explanation for the severity of L.M.'s injuries. Photographs introduced into evidence depicted two black eyes, a black ear, bite marks on her hand that left a scar, and deep and pervasive bruising across L.M.'s face, head, back, and arms. Those extensive injuries directly undermined Lee's account of a brief and momentary fight. The trial court emphasized this precise inconsistency, identifying the photographs as a major reason that it found L.M.'s testimony to be more credible than Lee's.

The affidavits also did not address the testimony of Teresa Baragas, who described finding L.M. naked outside her door at 3:00 a.m., screaming that she had just been raped. This testimony corroborated L.M.'s account—and undermined Lee's—by strongly suggesting that L.M. had fled Lee's car in a state of hysteria after being assaulted in traumatic fashion. None of the affiants undermined or provided a plausible counter-explanation for Baragas's testimony.

Nor could any affidavit mend the contradictions between Lee's testimony and his prior written statement. Those contradictions were significant. Indeed, they concerned issues as foundational as whether Lee and L.M. engaged in a sexual act, whether Lee stopped by L.M.'s house, why Lee fought with L.M., and whether Lee observed Manley and L.M. having sex. Smaller discrepancies also abounded, including the name of the liquor lounge, the presence of cocaine, and whether Lee left L.M. alone with his keys. Ultimately, no number of affidavits could have cured the damage to Lee's credibility that resulted from his multiple inconsistent statements.

At an even more basic level, the record provides little basis for us to be confident that the witnesses would have actually testified in a manner consistent with their affidavits—or that such testimony would have held up to scrutiny if they had. At trial Lee never mentioned interacting with any of the witnesses. Worse, he specified that the person he ran into at the liquor lounge was a "Simon something," not the affiant Charlene Parker.

The district court found Lee's contention that Friedman directed him to censor his testimony to cover up his own failure to investigate to lack all credibility. We see no error in this finding. To credit the accounts in the affidavits, therefore, the district court would have had to find that Lee, a man on trial facing life imprisonment, had five eyewitnesses who could have corroborated his story but nonetheless either neglected or decided not to mention them. Even more, the district court would have had to believe that Lee affirmatively altered his account to avoid any reference to an exculpatory witness. To describe this hypothetical is to expose its absurdity. At the end of the day, the stark inconsistency between the affidavits and Lee's own testimony defeats any notion that the latter would have changed the course of Lee's trial.

For at least one witness, we need not speculate on this point. Byron Massenburg denied preparing, signing, or even seeing the affidavit attributed to him, explaining that its contents were false. Asked how he could be so certain, Massenburg gave specific and convincing reasons. He testified that he would have never spent time on State Street that late at night in 1995 because, as an African-American, his presence might spark an incident. For that reason, he emphasized that there was no way he would have forgotten if his car

had broken down in that area. The overt rejection of his supposed affidavit suggests that calling Massenburg at trial as a defense witness may well have materially harmed —not helped—Lee's case.

Our review of the record, including the additional evidence developed by the district court on remand, leaves us convinced that Lee fell well short of meeting his burden of demonstrating prejudice under *Strickland*. See *Harrington v. Richter*, 562 U.S. 86, 104 (2011) ("It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (cleaned up)).

For these reasons, we AFFIRM.