Clerk of the Court
Received 12/30/2024 06:15 PM
Filed 12/30/2024 06:15 PM

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-210

ROBERT WILLIAMS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia

Criminal Division

BRIEF FOR APPELLANT

---

* THOMAS D. ENGLE
Burka and Engle, P.L.L.C.
Suite 900 South
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 574-0400
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT IT WAS A REASONABLE STRATEGIC DECISION FOR DEFENSE COUNSEL TO FORGO DNA TESTING DESPITE DETERMINING THAT APPELLANT WAS PREJUDICED BY COUNSEL'S FAILURE TO REQUEST TESTING

II.

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT DEFENSE COUNSEL'S FAILURE TO ADVISE APPELLANT OF HIS RIGHTS UNDER THE INNOCENCE PROTECTION ACT WAS EFFECTIVE REPRESENTATION BECAUSE DEFENSE COUNSEL COULD ASSUME PRIOR COUNSEL DID SO

III.

WHETHER THE TRIAL COURT ERRED IN FAILING TO ORDER POST-CONVICTION DNA TESTING WHERE TRIAL COUNSEL WAS INEFFECTIVE

STATEMENT OF THE CASE

Appellant previously appealed the denial of his ineffective assistance motion without a hearing. This Court remanded for a hearing to be conducted. The trial court conducted a hearing on February 14, 2024.

On February 26, 2024, the trial court orally announced its decision. On the first *Strickland* factor – deficient performance – the trial court ruled that defense counsel made a strategic decision not to pursue DNA testing and thus there was not deficient performance.

However, as to the second factor – prejudice – the trial court ruled that were this Court to hold that there was deficient performance, then appellant demonstrated prejudice by his attorney's failure to seek DNA testing.

STATEMENT OF FACTS

This Court previously summarized the facts of this case in its Remand Order of August 29, 2024:

> [O]n April 28, 2015, Angela Roberts was moving out of the Benning Courts apartment complex, located at 1705 Benning Road, Northeast, when an individual later identified as appellant entered her apartment and placed a gun to the back of her head demanding money. After Ms. Roberts declined to give appellant money, he struck her on the head with the gun. Elliott Dupervil, who shared the apartment with Ms. Roberts, came into the living room after hearing screaming and attempted to call the police. Appellant followed Mr. Dupervil into his room with the gun, took between $80 and $100 from Mr. Dupervil's dresser, then fled the apartment. Mr. Dupervil immediately called 911 and described the individual who robbed them as a dark-skinned male, wearing a mask, blue jeans, a black "hoodie," and blue New Balance sneakers.
>
> Surveillance cameras from around the apartment complex revealed an individual entering Benning Court at the time of the crime wearing the same apparel Mr. Dupervil described to the police. Based on the surveillance video, Ms. Roberts identified [that same individual entering Benning Courts near the time of the crime] as the robber both at the hospital and at trial. Metropolitan Police Department (MPD) Investigator Alexis Sakulich responded to Benning Courts to assist in reviewing the surveillance footage. Based upon her knowledge of the area from her

time working with MPD, Investigator Sakulich identified the appellant as the suspect depicted in surveillance.

Investigator Sakulich was present when appellant was arrested at 1736 Benning Road, the apartment complex located across the street from the robbery, six hours after the incident. Appellant was wearing an outfit that largely matched the individual in the video surveillance. Police took into evidence a black hoodie from a closet approximately five feet from appellant, white headphones similar to those depicted in the footage, and $67 in cash from a coffee table located within the apartment. Neither a gun nor mask w[as] recovered during the arrest, and appellant's DNA was not linked to swabs taken at the scene.

At trial, the government presented testimony from Investigator Sakulich and submitted into evidence the Benning Courts surveillance tape. Investigator Sakulich testified that she had patrolled the police district encompassing Benning Courts since 2006, and it was the only area she has ever patrolled since joining the MPD. Based on her nine years working near Benning Courts, Investigator Sakulich testified to her knowledge and experience within the area and her familiarity with the residents and frequent visitors. She further testified to having previous interactions with appellant over the course of "some years," at times seeing him on a day-to-day basis within the "general area" of the Benning Courts apartment complex.

At trial, Investigator Sakulich identified appellant as the suspect depicted in the surveillance footage. Her identification was not objected to by the defense. On cross-examination, Investigator Sakulich admitted that, although the suspect's face is not directly shown in all of the footage, she was able to base her identification on her

> familiarity with appellant's general facial features, hairline, and other characteristics.

Remand Order, Aug 19, 2022, quoting original Memorandum Opinion and Judgment.

This Court then summarized the post-trial ineffective assistance claim:

> At trial, appellant's defense was misidentification, based on the evidence that the perpetrator was masked, such that neither Ms. Roberts nor Mr. Dupervil saw his face. Neither victim identified appellant as the robber. Trial counsel highlighted in closing argument that the complainants could describe only the "generic-type," "standard-issue" clothing worn by the robber. Trial counsel's closing argument also focused on the poor quality of the surveillance video and of the still photos derived from the video. In addition, trial counsel attacked the reliability of Investigator Sakulich's identification of appellant as the individual depicted in the video and attacked the police investigation as "Keystone Cop worthy." Counsel pointed out in particular that crime scene investigators did DNA swabbing of some items in the apartment, but that no one obtained a DNA sample from appellant for comparison purposes. Nor, counsel emphasized, was there any fingerprint testing or other forensic evidence linking appellant to the crime. Counsel also stressed that police did not recover a gun or ski mask from appellant. Counsel drew the jury's attention to the evidence that the apartment where appellant was arrested, and where a black hoodie was found hanging in a closet, was not appellant's residence. Finally, counsel reminded the jury that the surveillance video showed an individual in generic clothing and a popular shoe brand; counsel acknowledged that the clothing items resembled items appellant was

> wearing at the time of his arrest, but told jurors that appellant had not been proven guilty of the crimes.
>
> On October 14, 2019, before the mandate issued in his direct appeal, appellant moved for relief pursuant to § 23-110, alleging ineffective assistance by trial counsel. The motion asserted that trial counsel failed to arrange for testing of the "shoes, pants, and sweatshirt" (i.e., the black hoodie) involved in the case. The motion was not accompanied by an affidavit or declaration by appellant, but it asserted that appellant "told his trial counsel that he wanted the evidence tested." On June 19, 2020, pursuant to D.C. Code § 22-4133(a), appellant also sought post-conviction DNA testing of the "[s]weatshirt, [s]hoes, and [p]ants" that were submitted into evidence at trial and submitted an affidavit attesting to his actual innocence of the crimes. On October 20, 2020, the Honorable Juliet McKenna denied appellant's requests. Judge McKenna concluded from the trial record that trial counsel's performance was not deficient and also that appellant could not establish prejudice, i.e., that there was not a "'reasonable probability of a different outcome'" from DNA testing. Having denied appellant's § 23-110 motion, the court also ruled that appellant was not entitled to DNA testing under § 22-4133(a)(3) (applicable to previously untested material that "[w]as not previously subjected to DNA testing because of circumstances that would entitle the applicant to relief under § 23-110").

Id, pp. 3-4.

This Court remanded for a hearing to "probe what appellant may have said to his trial counsel about DNA testing:"

> Thus, DNA testing that might have excluded appellant as a contributor to any DNA on the hoodie, or that might have detected no evidence of victim Roberts's DNA on the hoodie, shoes or pants, could have made a difference in the outcome of appellant's case. To be sure, appellant's trial counsel may have made a not-to-be-second guessed strategic or tactical decision not to seek DNA testing, and we do not know (and more to the point, the trial court did not know) whether appellant actually asked his counsel to arrange for testing, as appellant's (unverified) motion asserted. Yet inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. Trial counsel is strongly presumed to have made all significant decisions in the exercise of reasonable professional judgment. But without a hearing at which counsel could explain his rationale and address whether appellant requested that counsel pursue DNA testing, the trial court had no basis for determining whether the non-testing was a strategic decision or an objectively unreasonable omission. We conclude that the trial court was premature in concluding that appellant's trial counsel was not deficient.

Id,, pp. 9-10 (quotations and citations omitted).

ARGUMENT

I. Attorney Williams Was Ineffective for Failing to Conduct DNA Testing

A. Factual Introduction

The trial court found that appellant did not request that his attorney perform DNA testing.[1] Yet, that does not end the inquiry. Appellant asserts that the trial court erred in finding the trial attorney's decision not to pursue DNA testing was reasonable: (1) declining to conduct an investigation when the client professes innocence is not a reasonable strategic decision; and (2) the trial attorney based the decision on an insufficient factual basis, rendering it unreasonable..

(1) Attorney/Client Relationship

Both attorney Williams and appellant agreed that attorney Williams dominated their relationship. As explained by appellant, attorney Williams "brushed me off" and "just did what he wanted to do." Tr. 2/14/24, pp. 58-59, 62. As explained by attorney Williams, appellant "didn't seem to forcefully engage, if you will. He was a rather passive listener...." Tr. 2/14/24, p. 96.

Appellant testified that attorney Williams gave him no choice about how the case was going to be tried, "he just told me." Tr. 2/14/24, p. 88. Attorney Williams

[1] Appellant's contrary testimony on this point was not credited by the trial court.

testified that appellant was on board with a misidentification defense, "as far as I could tell." Tr. 2/14/24, p. 98.

(2) Appellant Expressed His Innocence to Attorney Williams

While he chose not to believe appellant – based on insufficient facts discussed *infra* – attorney Williams conceded that appellant expressed his innocence at their very first meeting:

> He had never indicated to me ... affirmatively that he hadn't participated in the event. I believe he, when I asked him open-ended questions when we first met to discuss it, didn't understand why he would possibly have been arrested, which is not really a strong denial, either.

Tr. 2/14/24, p. 100. From his perception of the conversation, attorney Williams considered appellant's statement to be a denial, but concluded that it was not a "strong denial." There was no suggestion in attorney Williams' testimony that appellant ever wavered in his a denial of the offense throughout the entire representation.

(3) Attorney Williams Believed Appellant's Denial Was a Lie, so Attorney Williams Did Not Seek DNA Testing

Despite appellant's denial, attorney Williams concluded that appellant was involved in the offense, which was the basis for his decision not to seek DNA testing

.

Attorney Williams testified to an incident – which he described as a "tell" – that appellant was lying to him about not being involved.

Attorney Williams provided appellant with the name of an individual, "Ant," from the police report who might be able to assist the defense. Appellant told attorney Williams that he "vaguely" knew Ant; it was agreed that appellant would try to obtain contact information for Ant. When they next met, appellant indicated that he did not want to pursue that. Attorney Williams used this to support a belief that appellant was guilty, which informed his decision not to pursue DNA testing:

> And the next time we got together with the investigator, I brought up that matter of trying to track down [Ant] and [appellant] specifically told me not to pursue that, which, for me, was a bit of a tell that -- if he didn't want me talking to somebody, obviously, hiding something, but he just didn't want me to go any further because it was probably incriminatory.

Tr. 2/14/24, p. 102. There was no follow-up discussion of whether appellant could even find Ant, whether the Ant did not want to cooperate, or why appellant did not want to pursue Ant.

Despite basing his strategic decision-making on the notion that appellant's denial was a lie, attorney Williams did not probe the denial further. Attorney Williams testified that he was fearful that if he were to inquire further as to appellant's asserted innocence, he would be fired by appellant:

> I was his third attorney, and it's been my experience, with many of my clients, that sometimes if you push them too far like you're interrogating them like a prosecutor would about their recollection and so forth of the events, they're going to want a new attorney, and I just let it go.

Tr. 2/14/24, pp. 102-03.[2]

Despite lacking a firm foundation for his belief that appellant falsely denied involvement, attorney Williams's decision making was based on his acceptance of the government's case. He described the evidence as stacked against appellant:

> [G]iven what we knew about the Government's case: the statements of at least two eyewitnesses to the offense, the complaining witness, and the roommate – his name escapes me right now – the – there was surveillance video that the Government had available to it. He was apprehended within a few hours after the offense, within probably a few hundred yards of where the offense occurred. He was on GPS monitoring at the time because he was on probation or pretrial release – I forget – but he was on a GPS monitor. That monitor had placed him at the scene of the offense, at the time the offense occurred, and it assisted the police when they went to go arrest him. It placed him at that neighboring apartment with some precision when he got arrested.

Tr. 2/14/24, pp. 98-99.

[2]Attorney Williams was concurrently appointed to five different cases of appellant. Tr. 2/14/24, p. 92. Attorney Williams was appointed under the Criminal Justice Act, which compensates attorneys by the hour, not on a retainer basis.

Believing the government's evidence – and not his client's denial – attorney Williams decided not to pursue DNA testing:

> Well, again, I was not confident that Mr. Williams had nothing to do with the offense; that, in fact, it probably would have – if there were any biological material on any of those things, it very well could have been incriminating against Mr. Williams.
> ....
> Boy, it's hard to – when the Government's got DNA evidence placing a client at a scene – and DNA is pretty compelling scientific evidence – it's hard to come up with a strategy to explain that. .... I'm not sure how you defend that case.

p. 104

Attorney Williams conceded that there was no discussion with appellant of the possible benefits of DNA testing. He simply told appellant that the defense would be based on the lack of a DNA testing:

> Q. And what specifically about the lack of forensic evidence did you discuss?
>
> A. Well, that there were no fingerprints putting him on the scene. There was no DNA evidence tying him to the scene.

Tr. 2/14/24, p. 96. Attorney Williams never even mentioned the possibility of DNA testing to appellant:

> Q. So that means that you never actually had a conversation with him about the potential of DNA evidence in this case, either for or against?
>
> A. No. I believe I spoke about the absence of DNA evidence in the Government's case. I'm absolutely certain that I would have had that discussion with him --
>
> Q. But not the --
>
> A. -- because that fed into the misidentification.
>
> Q. But not the opposite conversation where, because he -- you're saying he never asked you about it, so you would not have had the conversation about why that would have been a bad idea?
>
> A. Well, I probably didn't have that conversation with him.

Tr. 2/14/24, p. 116. Appellant's testimony also confirmed that there was never any discussion of risk/benefit involved with DNA testing. Tr. 2/14/24, pp. 59, 82.

Indeed, so sure was attorney Williams of appellant's guilt, that he testified that had appellant requested DNA testing, "I would have discouraged him pretty strongly." Tr. 2/14/24, p. 99. In fact, attorney Williams believed that simply requesting DNA testing would give the government the idea to conduct its own testing – the results of which would prove appellant guilty:

> But it would have been pretty foolhardy, in my estimation, to try to pursue that, because it would have required asking the government, who had not done any DNA testing, who had not taken a swab from my client, who had not taken a

> swab from the complaining witness, and there were no – as far as I could tell from the crime scene reports and everything, there was no DNA that had been collected at all. If I alerted them to the fact that I wanted to be provided with the clothes that were taken from the closet that Mr. Williams now thinks might have had DNA on them, and I also wanted a swab taken from Ms. Roberts, they probably would have pursued DNA testing on – [the Government] would have probably – pursued DNA testing on your own.

Tr. 2/14/24, p. 102.

B. Standard of Review

This Court has clearly defined the standard of review with respect to ineffective assistance claims under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Both prongs of *Strickland* are mixed questions of law and fact, so we accept the trial court's findings of fact unless they lack evidentiary support in the record, and we review the trial court's legal determinations *de novo.*

Bellinger v. United States, 294 A.3d 1094, 1104-05 (D.C. 2023).

In the context of a challenge to whether a trial attorney's decision making was a reasonable strategic choice, this Court will credit the trial court's credibility assessment of whether the attorney considered the issue and made a decision – as opposed to being oblivious to the issue. However, this Court reviews whether the attorney's decision was reasonable *de novo*. *Richardson v. United States*, No. 22-CO-0900 (D.C. July 18, 2024) ("While we do not second-guess Judge Hertzfeld's credibility finding that [the trial attorney] made a strategic choice to forgo an entrapment defense, that decision was beyond the wide bounds of what might be considered reasonable trial strategy. ... These attorney's justifications do not withstand scrutiny.")

C. Legal Discussion

At the risk of putting the cart before the horse, although the trial court found that attorney Williams' decision not to conduct DNA testing was tactical, which this appeal challenges, the trial court correctly found that – if this Court disagreed with that assessment – then appellant demonstrated prejudice.[3]

---

[3]The trial court held:

> I am satisfied, based upon the testimony of [the DNA expert], and as I said, [at the evidentiary hearing], just based upon common sense, that the defendant has demonstrated a reasonable probability that the victim's blood could have been present on the shoes and pants that he was wearing at the time of his arrest if he had, in fact, been involved in the altercation, as well as on the hoodie, and that the DNA of the wearer of the hoodie would have left DNA on that item of clothing.

(continued...)

In short, the trial court found appellant established the second *Strickland* prong, but not the first, concluding that it was reasonable for defense counsel to forgo DNA testing. Appellant asserts that defense counsel's decision was unreasonable as a matter of law or, in the alternative, that the trial court erred in determining it was reasonable.

(1) *Per Se* Unreasonable for Defense Attorney to Decline to Investigate Based on Belief that Client's Denial of Involvement Was a Lie

The *Strickland* case teaches that

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

---

[3](...continued)

> Moreover, I do find that the defendant has established a reasonable probability that had DNA testing excluded the defendant as a contributor to any DNA on the hoodie or if such testing detected no evidence of the victim's DNA on the hoodie, shoes or pants, that this could have created a reasonable probability of a different outcome at trial, resulting in the defendant's acquittal, given the overall weakness of the other identification evidence at trial.

Tr. 2/26/24, pp. 47-48.

466 U. S. 668, at 690–91.

As indicated above, appellant protested his innocence, stating that he could not understand why he had even been arrested in connection with these crimes. *Supra*, p. 8. Attorney Williams understood appellant's statements to be a denial, although he did not consider it a strong denial. Because attorney Williams did not believe appellant's denial, he did not seek DNA testing, believing that it would assist in convicting appellant. *Supra*, pp. 11-12.

While an attorney may have virtually unfettered decision making with respect to how evidence is presented at trial, an attorney cannot simply decline a path of investigation based on the belief that the client is guilty, where the client indicates the contrary.

In the case of *State v. Lenkart,* 262 P.3d 1 (Utah 2011), the defense attorney did not seek to have a rape kit tested for salivary amylase, which would be present if the defendant engaged in oral sex as charged. Like attorney Williams in this case, the government in *Lenkart* tried to justify the decision as strategic:

> [T]rial counsel reasonably could have concluded that asking the state crime lab to test the [rape] kit would have undermined Defendant's consent defense because if the results came back positive, it would have constituted irrefutable proof that [the defendant] lied about not having oral sex with [the complainant].

Id. at 8.

The Supreme Court of Utah flatly rejected that reasoning: "We cannot imagine a circumstance in which trial counsel could justify declining to test physical evidence that his client reasonably believes would be exculpatory. ... The decision of Lenkart's trial counsel not to investigate this evidence cannot constitute a strategic decision." *Id.*

To be sure, the *Lenkart* case involved a specific testing request by the defendant whereas the instant case involves a denial of the offense. But the underlying point is the same. Where the defendant protests his innocence, an attorney cannot fail to conduct exculpatory testing based on his hunch that the defendant is guilty. At a core level, a criminal defendant is entitled to his attorney's support regardless of seemingly insurmountable evidence; an attorney is not free to justify inaction through disregarding his client's denials.

(2) Even Assuming a Defense Attorney Can Ignore a Client's Denial, Attorney Williams Lacked a Reasonable Basis to Decline DNA Testing

Defense counsel is responsible for taking all appropriate actions in a case. Courts have analogized that defense counsel is "captain of the ship"[4] and virtually all

[4] *See, e.g., Arko v. People,* 158 P.3d 555, 558 (Colo. 2008); *People v. Freeman*, 882 P.2d 249 (Cal. 1994).

decisions about the direction of the case are committed to defense counsel's discretion. *Blackmon v. United States*, 146 A.3d 1074, 1079 (D.C. 2016).[5]

While the Supreme Court has held that "strategic and tactical decision are the exclusive province of the defense counsel," *Jones v. Barnes*, 463 U.S. 745, 753 n.6, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), such decisions are only entitled to deference when made "on the basis of sufficient pretrial investigation." *Leftridge v. United States,* 780 A.2d 266, 273 (D.C. 2001).

Just last year, this Court pointed out:

> This "presumptive deference" to tactical decisions does not apply, however, to "decisions that are inexcusably uninformed or under-informed." *Cosio,* 927 A.2d at 1123. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Stickland*, 446 U.S. at 691.

Bellinger v. United States, 294 A.3d 1094, 1106 (D.C. 2023); *Kigozi v. United States,* 55 A.3d 643, 654 (D.C. 2012) ("the decision not to call an expert at trial cannot be considered a 'tactical' choice to which the court will defer" where "trial counsel's investigation into what an expert could contribute to challenge the credibility of

---

[5]Only a few core decisions involving Constitutional rights remain for the defendant alone: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." District of Columbia Rules on Professional Conduct 1.2 (a).

[witnesses] was unreasonable"); *Gaulden v. United States,* 239 A.3d 592, 600 (D.C. 2020) (deferring to trial counsel's decisions only where "it was a reasonable strategy, and it was selected ... on the basis of sufficient pretrial investigation.")

. Here, attorney Williams had appellant's denial of the offense – even though he did not think appellant expressed his denial in strong terms. At a minimum, attorney Williams was required to probe the denial before concluding it was false, and deciding not to pursue DNA testing on that basis. His fear that appellant would "want a new attorney" and so he "just let it go" speaks volumes but does not constitute a "strategic decision." Tr. 2/14/24, pp. 102-03.

It would have been a simple matter for attorney Williams to explain to appellant that DNA testing could be done, which could conclusively place him on scene and virtually guarantee a conviction if there was a match, or could assist in his acquittal if there was no match. This simple questioning of his client could have provided a reasonable basis to inform attorney Williams' decision whether to request testing. Yet, as attorney Williams conceded, he never discussed DNA testing whatsoever with appellant. Tr. 2/14/24, p. 116

Likewise, attorney Williams' reliance on the fact that appellant no longer wished to use a witness was not enough to support a belief that he was guilty. Attorney Williams never asked the simple question, "Why don't you want Ant as a witness?" Perhaps Ant was concerned about his involvement in the marijuana trade; perhaps appellant was honoring the code of the street not to involve witnesses without their permission; perhaps appellant did not realize that the defense could force Ant to testify over Ant's objection through the use of a subpoena; perhaps appellant learned that Ant did not have valuable testimony to give; or perhaps he couldn't find Ant. Rather than ask appellant why he did not want to pursue Ant – whom he only "vaguely knew" – Williams simply assumed that it meant appellant was guilty. A hunch or assumption does not constitute a reasonable basis.

Attorney Williams had far too few facts to support a belief that appellant was lying about his innocence to make an decisions on that basis. A judge facing a discretionary decision must have "sufficient facts upon which the court based its discretion." *Freeman v. United States,* 689 A.2d 575, 586 n.9 (D.C. 1997). So too a lawyer, making a significant strategic decision, must develop a sound factual basis. *Strickland* itself teaches that deference is only given to strategic choices based on a "thorough investigation" and "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[6] *Strickland,* 466 U.S. at 690–91.

---

[6]Appellant concedes that a defense attorney may elect to forgo a defense. For example, a client may inform the lawyer that he has an alibi. After investigation, the (continued...)

Attorney Williams made important strategic decisions made on a hunch that appellant was guilty and a "tell" that had little, if any, weight. The trial court erred in determining that attorney Williams made a strategic decision, as case law defines that concept.

II. Appellant's Trial Attorney Was Ineffective for Failing to Inform Him of His Right to DNA testing Under the Innocence Protection Act

A. Factual Introduction

Attorney Williams conceded that he did not discuss the Innocence Protect Act with appellant, nor did he request that the trial court conduct an IPA inquiry.

Attorney Williams was appointed to represent appellant after prior counsel moved to withdraw. Attorney Williams sought to deflect blame in not requesting IPA testing:

---

[6](...continued)
lawyer may decide that the alibi is weak and not likely to be believed by the jury. The lawyer is well within the bounds of his/her discretion to decide not to present the alibi defense. This is the type of strategic decision that is virtually immune from review.

The situation here is quite different. This is not a situation where the lawyer investigates a defense proffered by the defendant and decides that it lacks persuasiveness and so does not present it to the jury, but rather a situation where the lawyer declined to investigate a defense based solely on a hunch that the defendant was guilty.

> In my case with Mr. Robert Williams, I was asked to represent him about a week before this particular case was to go to trial. So his prior counsel had made the discovery requests and had provided me with his file.

Tr. 2/14/24, p. 94. Attorney Williams continued, "but I was appointed a week before he was scheduled to go to trial. You know, an IPA hearing would have been conducted months or so before...." Tr. 2/14/24, p. 94. Later, during cross-examination, attorney Williams conceded that given continuances, trial began "probably within 4 or 5 months of my appointment." Tr. 2/14/24, p. 117.

Attorney Williams did not discuss appellant's rights to an IPA hearing, because he simply assumed it had already been conducted, although conceding that he had no recollection of looking through former counsel's file and had not noted it on his own file. Tr. 2/14/24, pp. 108, 120. Attorney Williams admitted that he knew that he could retain an expert for DNA testing under the Criminal Justice Act. Tr. 2/14/24, p. 119.

Despite not discussing testing with appellant, attorney Williams testified that he understood it was appellant's right to have testing performed:

> If a client -- there are some requests that a client makes that you don't have to follow through on. Some of them have to do with "call my baby's mama" type stuff, but I just don't see how you -- how you can get around it. I certainly would not try to get around pursuing DNA testing

Tr. 2/14/24, p. 119.

The bottom line: despite knowing of the availability of DNA testing, knowing that it was appellant who made the decision whether to avail himself of DNA testing, Attorney Williams never discussed DNA testing with appellant.

The trial court excused this oversight, concluding that since he was not the first attorney in the case, attorney Williams "was reasonable in assuming that the IPA inquiry had predated his appointment to the matter." Tr. 2/14/24, pp. 38-39.

B. Standard of Review

The standard of review is discussed *supra,* p. 13.

C. Legal Discussion

The District of Columbia Innocence Protection Act of 2001 requires a defendant charged with a violent crim to be notified that "he or she may request or waive DNA testing of biological material prior to trial or the entry of a plea if the biological material has not been subjected to DNA testing." D.C. Code § 22-4132(b)(2) (2002).

The statute specifically requires that the defendant be informed of "the potential evidentiary value of DNA evidence in the defendant's case...." D.C. Code § 22-4132(b)(3) (2002). Clearly, this imposes a duty upon defense counsel as neither the trial court nor the prosecutor is in a position to assess the value *vel non* of DNA evidence in the defendant's case.

In this case, attorney Williams admitted that he merely discussed the fact that the government was not presenting any DNA evidence, but failed to discuss the potential of defense DNA testing or "the potential evidentiary value" of such testing.

This Court held in the case of *Teoume-Lessane v. United States,* 931 A.2d 478, 489 (2007), that while it is plain error for a trial court to fail to advise a defendant of his/her IPA rights, such does not require reversal as a matter of law. In so ruling, *Teoume-Lessane* focused on the trial court's conduct in failing to inform the defendant of his IPA rights:

> The statute is devoid of any language mandating reversal of an otherwise valid conviction because of the court's failure to comply with its pre-trial notification requirements.

931 A.2d at 488.

This case presents a quite different question: whether a defense counsel is ineffective for failing to inform a defendant of his right to testing and discussing the potential evidentiary value of testing.

For the same reasons that the trial court's failure in *Teoume-Lessane* was plain error, defense counsel's failure in this case is deficient performance. And as the trial court found, had DNA testing been conducted in this case, the outcome "could have created a reasonable probability of a different outcome at trial, resulting in the defendant's acquittal, given the overall weakness of the other identification evidence at trial." Tr. 2/26/24, p. 48.

In *Teoume-Lessane* reversal was unnecessary because "Appellant has not shown, however, that the deviation affected his substantial rights, much less that it seriously affected the fairness, integrity or public reputation of proceedings." In contrast, in the instant case, the trial court made just such a finding as indicated above.

Even assuming that it was a reasonable trial strategy not to pursue DNA testing, there is no such justification for attorney Williams failing to inform appellant of "the potential evidentiary value of DNA evidence in the defendant's case...." His deficient performance caused prejudice. Appellant is entitled to a new trial with effective counsel.

III. Denial of Post-Conviction Testing Was Error

The trial court's denial of the request for post-conviction testing was based on its conclusion that appellant had effective representation. This conclusion falls like a domino if appellant's arguments above are accepted.

CONCLUSION

In previously remanding this case, the Court indicated that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decision." As shown above, defense counsel's conversations provided virtually no support for the notion that his decision to forgo testing was strategic. In defense counsel's own words, he "just let it go" rather than determining the facts he would need to make a reasonable decision.

Given that the trial court specifically found that appellant was prejudiced by this decision – if it were not tactical – the trial court's Order must be reversed.

Respectfully submitted,

Thomas D. Engle #387676
BURKA AND ENGLE, P.L.L.C.
Suite 900 South
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 574-0400

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered via electronic service to the government on this _30st_ day of December, 2024.

Thomas D. Engle