

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1998-003520

07/06/2010

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
C. Arvallo
Deputy

STATE OF ARIZONA

JEFFREY A. ZICK

v.

JOHN EDWARD SANSING (A)

ALAN M SIMPSON

APPEALS-PCR
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

RULING

This court has considered the Defendant's Claim 1 in his Second Amended Petition for Post Conviction Relief (that the defense failure to meet its burden of production of mitigating factors was a result of ineffective assistance of counsel), the response and reply, both parties' memoranda, the exhibits and evidence presented at the hearing held before this court on the Defendant's Petition. This matter has been under advisement since the conclusion of counsels' excellent oral arguments on May 7, 2010.¹ For the reasons explained in this ruling, this court must deny the Defendant's Second Amended Petition for Post Conviction Relief.

¹ Counsel are to be commended for their thorough and sensitive handling of the difficult issues raised in the ineffective assistance of counsel claim.

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Procedural history of the case

On September 18, 1998, Defendant John Edward Sansing pled guilty to First Degree Murder, Kidnapping, Armed Robbery, and Sexual Assault committed on February 24, 1998. Sansing called a local church, the Victory Assembly Church, to request food and assistance for his family, "...all the while planning to rob the unsuspecting Good Samaritan who delivered the food, so that he could purchase crack cocaine."² Trudy Calabrese was that innocent Good Samaritan. With his wife and minor children assisting, Sansing knocked Calabrese to the floor and tied her wrists and legs with electrical cord. Sansing beat Calabrese, then dragged her to a bedroom where he raped her after she had regained consciousness. Trudy Calabrese "...prayed to God and pleaded with the Defendant's wife and children to help her and call 9-1-1".³ After the rape, Sansing fatally stabbed Trudy three times in the abdomen with a rusty butcher knife.⁴

An aggravation and mitigation hearing was held before the trial court without a jury. The trial judge, the Hon. Ronald Reinstein, found that the State had proved two aggravating circumstances:

- (1) The murder was committed in the expectation of the receipt of pecuniary gain; and,
- (2) The murder was committed in an especially cruel, heinous, or depraved manner.

Judge Reinstein determined that the Defendant failed to prove any statutory mitigating factors; however, the court found that the Defendant proved five non-statutory mitigating circumstances:

- (1) The Defendant was impaired or affected from the use of crack cocaine;

² Judge Ronald Reinstein's Special Verdict of Sept. 30, 1999, at p. 4.

³ Id. at 6.

⁴ Id. at 7.

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- (2) The Defendant had a difficult childhood and a dysfunctional family;
- (3) The Defendant accepted responsibility for his actions and is genuinely remorseful for the crime;
- (4) Defendant's lack of education; and
- (5) The love and support of the Defendant's family.

Judge Reinstein determined that the mitigating circumstances were not sufficiently substantial to call for leniency. He ordered that the death penalty be imposed for the crime of First Degree Murder of Trudy Calabrese.

On direct appeal, the Arizona Supreme Court affirmed Sansing's convictions and sentences; however, the Court vacated the finding that the murder was committed for pecuniary gain.⁵ In light of [Ring v. Arizona](#)⁶, the United States Supreme Court vacated Sansing's sentence and remanded for further consideration.⁷ Thereafter on remand, the Arizona Supreme Court determined that the *Ring II* violation was harmless error and concluded beyond a reasonable doubt that any reasonable jury would have found that the mitigating evidence was not sufficiently substantial to call for leniency.⁸

This Second Amended Petition for Post Conviction Relief was timely filed, and this court has determined in regards to Claim 1 that the Defendant presented a colorable claim which entitled him to an evidentiary hearing on his claim of ineffective assistance of counsel.⁹ This court has also determined that Claim 4 (the death penalty was imposed as a result of the reviewing court's failure to give the mitigating evidence an appropriate weight) was an issue that

⁵ [State v. Sansing, 200 Ariz. 347, 26 P.3d 1118 \(2001\).](#)

⁶ [536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 \(2002\)](#) (Ring II).

⁷ [Sansing v. Arizona, 536 U.S. 954, 122 S.Ct. 2654, 153, L.Ed.2d 830 \(2002\)](#) (mem.).

⁸ State v. Sansing, 206 Ariz. 232, 77 P.3d 30 (2003).

⁹ Minute Entry of 7/18/08, at p. 2.

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should have been raised on direct appeal, and is therefore, precluded by Rule 32.2(a), Ariz. R. Crim. Proc.¹⁰ All other claims asserted by the Defendant in his Second Amended Petition for Post Conviction Relief failed to state or present a material issue of fact or law that would entitle the Defendant to any relief under Rule 32, Ariz. R. Crim. Proc.¹¹ All claims except the ineffective assistance of counsel claim in Claim 1, have been denied.¹²

Elements of the ineffective assistance of counsel claim

An ineffective assistance of counsel claim is comprised of two elements, both of which must be established in order for the claim to be successful. The first element requires the defendant show that counsel's performance was deficient.¹³ Proving the first element requires a showing that counsel made errors so serious that they were not functioning as the "counsel" guaranteed by the Sixth Amendment. The second element requires the defendant show that counsel's errors prejudiced the defense. The defendant must show 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.¹⁴ Lastly, the *Strickland* test must also be viewed in conjunction with the Arizona Supreme Court's *Ring* mandate, which requires a "harmless error inquiry ... on whether no

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1983), *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985).

¹⁴ *Strickland* at 694.

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reasonable jury could find that the mitigation evidence adduced during the penalty phase is ‘sufficiently substantial to call for leniency’.”¹⁵

The effectiveness of counsel’s representation is based on an objective standard of reasonableness, considering the circumstances of each case.¹⁶ But hindsight often colors second glances. Therefore, counsel is afforded a strong presumption that they acted within the wide range of reasonable assistance in order to avoid any unfair scrutiny. To challenge the effectiveness of counsel, a convicted defendant must identify the acts or omissions of counsel that reflect unreasonable professional judgment. Although the reasonableness of counsel’s performance can be gauged by prevailing practices and local standards, they should not be interpreted as strict rules because the application of prevailing practices as strict rules could restrict the autonomy that attorneys require to make tactical decisions.¹⁷ Thus, when adjudicating a claim of ineffectiveness, a court must judge the reasonableness of counsel’s challenged conduct based on the facts of the particular case, and what was known to counsel at the time.¹⁸ Strategic choices made after complete investigation of the law and facts are “virtually unchallengeable”, while strategic choices made after less than complete investigations are as reasonable as the investigation.¹⁹

¹⁵ State v. Ring, 204 Ariz. 534, 555, 65 P.3d 915 (2003).

¹⁶ Strickland at 688.

¹⁷ Id. at 689.

¹⁸ Id. at 690.

¹⁹ Id. at 691.

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Sansing claims his trial attorney was ineffective because he failed to develop and present expert testimony regarding his harsh childhood, his drug use, and his anti-social personality disorder.

Sansing's challenge begins with the assertion that his attorney failed to fully investigate and develop possible mitigating factors, because expert witnesses were not presented during the mitigation phase of his trial. Sansing claims that counsel's failure to utilize an expert to explain his difficult childhood and polysubstance abuse was not in accordance with prevailing practice or local standards, and that this was further compounded by a failure to establish a causal nexus between Sansing's upbringing, antisocial personality disorder and the crime.

Sansing argues that had his attorney consulted with an expert in cocaine addiction, evidence may have been adduced that could satisfy a finding by the court that Sansing's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was significantly impaired. Such a finding would constitute a statutory mitigator. Sansing maintains that counsel's failure to produce an expert to develop the causal nexus between his substance abuse and the crime is contrary to prevailing practice and unreasonable, and therefore constitutes ineffective assistance. During the evidentiary hearing, Sansing offered the testimony of Dr. Edward French, a pharmacologist who has performed extensive research on cocaine and its effects. Dr. French opined that the Defendant's use of cocaine diminished his ability to control his behavior at the time of the crime. Unfortunately, Dr. French did not ask the Defendant about the specific amounts of cocaine that the Defendant had used at the time of the crime. Much of Dr. French's opinions were based upon speculation

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about the quantity of cocaine that was used by the Defendant. What is known is that the Defendant reported to Mitigation Specialist Pamela Davis (and she reported this to Judge Reinstein in her letter to the court) that the Defendant had used \$750.00 worth of cocaine within the four days prior to and including the murder.

Dr. Richard Lanyon, a psychologist, was called by Sansing to testify about the effects of a cocaine-induced psychosis. It is Dr. Lanyon's opinion that, evidence to the contrary notwithstanding, Sansing suffered from a cocaine-induced psychosis that began shortly after Trudy Calabrese entered his home on the day of the murder. Unfortunately for Sansing, Dr. Lanyon's opinions were less than persuasive. Dr. Lanyon believed that Sansing's statement to him that everything went black and blank was a strong indication of psychosis.²⁰ However, Dr. Lanyon's opinions were contradicted by Dr. Michael Bayless (a psychologist called by the state) and several versions of the facts of the crime provided by Sansing in which he remembers many details after the alleged "going black" episode. Dr. Bayless opined that the Defendant suffered from a classic anti-social personality disorder, that Sansing was high on cocaine at the time of the crime, but that he knew what he was doing was wrong. Significantly, Sansing smiled as he described to Dr. Bayless the reason why he committed the rape: he saw Trudy Calabrese's vaginal area. Sansing also described that he placed a blanket over Trudy to stab her

²⁰ Sansing's trial attorney testified at the evidentiary hearing that he does not ever recall Sansing saying this to him. If Sansing had said this to him, he would have followed up on these statements.

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so as to avoid blood splatter. This court finds the testimony of Dr. Bayless to be the more credible and more persuasive.

During the evidentiary hearing, Sansing called Dr. Paul Miller, a psychologist specializing in adolescent child psychology, to testify about the serious effects of the Defendant's difficult childhood. He opined that parental neglect or rejection seriously affected the Defendant's propensity toward violent behavior. Much of this evidence regarding the Defendant's difficult childhood was discovered, evaluated, and reported by Mitigation Specialist Pamela Davis prior to the mitigation hearing and sentencing in 1999. Ms. Davis was employed to research Sansing's familial and social history. Davis traveled to three different states to speak with multiple family members about Sansing's childhood and dysfunctional family. Ms. Davis' work was included within her report/letter to Judge Reinstein submitted prior to sentencing.

In addition, Sansing's trial counsel consulted three mental health experts prior to the sentencing trial: Dr. Sara Hill, Dr. Catherine Menendez, and Dr. Susan Parrish.²¹ Dr. Menendez came to the conclusion that Sansing was not learning disabled, but diagnosed him with cocaine abuse in remission and antisocial personality disorder.²² Dr. Menendez also recommended ruling out paraphilia not otherwise specified. Sansing's trial counsel²³ conceded at the special hearing that he could not recall what records he supplied to Dr. Menendez, but states that it was his standard practice to give each mental health expert police reports, prior

²¹ R.T. of 1/22/10, at 110-29, 141-46. 148-49.

²² Exhibit 4.

²³ Now the Hon. Emmett Ronan, Judge of the Superior Court.

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mental evaluations, and information collected by the mitigation specialist. Counsel also indicated that he did not doubt supplying the reports to Dr. Menendez.²⁴

An inability to recall every aspect of the case does not rebut the strong presumption granted by *Strickland*, that counsel acted within the wide range of reasonable professional assistance.²⁵ Counsel also consulted Dr. Susan Parrish, a psychologist, who was asked to determine if Sansing displayed any psychological problems which would have justified specialized testing. Dr. Parrish was unable to recall any issues that required further testing.

In the evidentiary hearing, trial counsel testified that to offer the antisocial personality disorder diagnosis as a mitigating factor could have opened the door for the prosecution to rebut it with evidence of the Defendant's prior specific antisocial acts, which could have been very damaging to the Defendant.²⁶ The court understands trial counsel's dilemma to be if evidence of an anti-social personality is offered as mitigation, then the prosecution will have the opportunity to offer evidence that the mitigating effect is minimal (to "rebut" the mitigation) due to the nature of the Defendant's personality disorder: the Defendant committed other violent, anti-social acts, and possibly will commit future violent, anti-social acts. It clearly appears to this court that Ronan made a strategic decision to avoid this trap. This type of "double-edged"

²⁴ R.T. of 1/22/10, 123-4, 143.

²⁵ *Strickland* at 669. See also, *Greiner v. Wells*, 417 F.3d 304, 326 (2nd Cir. 2005) ("time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence that counsel's strategy arose from the vagaries of ignorance, inattention or ineptitude, *Strickland*'s strong presumption must stand.").

²⁶ R.T. of 1/22/10, at 166.

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mitigation evidence would be more detrimental than helpful, and making a strategic decision to avoid damaging a case for mitigation despite losing a slim advantage cannot be unreasonable.²⁷

Judge Ronan testified that he believed that Judge Reinstein's background and experience would allow him to understand the nexus between the Defendant's difficult childhood, his drug use, and the murder, and that expert testimony was not necessary. Ronan believed that Reinstein could make all the connections and understand the mitigation without an expert witness. This decision regarding the necessity of calling expert witnesses also appears to be in the nature of a strategic or tactical decision, based upon defense counsel's personal knowledge of the sentencing judge, and the sentencing judge's background and experience. The decision to avoid unnecessary and time-consuming expert testimony would inure to the Defendant's benefit.

Thus, the issue presented is whether Sansing's counsel performed deficiently, or rather, unreasonably based on the information he knew at the time, and based on the extent of his investigations and reliance on medical and mental health experts. Based on the factual accounts from the evidentiary hearing, counsel appears to have acted reasonably, even though no expert witnesses were called during the mitigation phase to attempt to create a causal nexus between Sansing's drug usage, tough childhood and antisocial personality disorder and the crime. This court finds that the testimony of Dr. Paul Miller regarding the Defendant's abusive childhood was duplicative of the investigation of Pamela Davis. The court further finds that the proposed expert testimony such as that offered by Drs French and Lanyon regarding the effects and nexus

²⁷ See Gerlaugh v. Stewart, 129 F.3d 1027, 1033-36 (1997); Bonin v. Calderon, 59 F.3d 815, 834-36 (9th Cir. 1995). See also State v. Gerlaugh, 144 Ariz. 449, 459-60, 698 P.2d 694, 704-05 (1985).

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between Defendant's cocaine use and the commission of the crime to be speculative and unpersuasive. The evidence of a "cocaine-induced psychosis" is speculative at best. Many of the facts upon which Dr. Lanyon based his testimony were quite effectively disputed by Dr. Michael Bayless. Dr. Bayless' opinions (including those disputing that any psychosis existed at the time of the crime given Sansing's detailed memory of what had occurred) were far more credible and reasonable. More importantly, Judge Ronan did not call expert witnesses for strategic or tactical reasons. I find no deficient performance by trial counsel.

Sansing must show a reasonable probability that the outcome would have been different but for counsel's errors

If one assumes for purposes of evaluating all the legal issues that Sansing's trial counsel performed deficiently by failing to investigate and call experts, the issue of prejudice remains. Sansing must show a reasonable probability that the outcome would have been different but for counsel's errors, a reasonable probability meaning a probability sufficient to undermine the confidence of the outcome.²⁸ Sansing has not met that burden.

Sansing's argues that expert testimony concerning his harsh childhood, antisocial personality disorder, and polysubstance abuse would have developed a causal nexus to the murder of Trudy Calabrese. Sansing also argues that the connection between his upbringing and

²⁸ Strickland at 694.
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the murder would raise a reasonable doubt as to whether Sansing could appreciate the wrongfulness of his conduct or conform his physical conduct to the requirements of the law.

It has been consistently held that an effort to evade prosecution after committing a crime is sufficient to undermine a claim that a defendant did not appreciate the wrongfulness of his conduct.²⁹ In *State v. Reinhardt*³⁰, the Defendant's claim that he could not appreciate the wrongfulness of his actions was belied by his attempts to cover up the crimes by dumping bodies in a mine shaft. Similarly, in *State v. Medrano*³¹, Defendant's claim that he was unable to appreciate the wrongfulness of his actions is vitiated by his attempts to avoid prosecution by disposing of the murder weapon.

As in *Reinhardt* and *Medrano*, Sansing's claims that he did not appreciate the wrongfulness of his actions are contradicted by his actions subsequent to murdering Trudy Calabrese. Sansing moved the van that Mrs. Calabrese had driven to a nearby parking lot so that it was not evident that she had visited his home. When Mrs. Calabrese's church called to see whether she had arrived, Sansing told them she had not, and even gave the church a false address in order to make it seem as though Mrs. Calabrese visited the wrong home. Finally, Sansing hid Mrs. Calabrese's body. Each action was performed in order to elude suspicion and avoid prosecution. Even if an expert testified about a causal nexus between Sansing's anti-personality disorder and the crime, Sansing's actions to avoid prosecution clearly demonstrated that he fully

²⁹ *State v. Reinhardt*, 190 Ariz. 579, 591-92, 951 P.2d 454, 466-67 (1997); *State v. Medrano*, 185 Ariz. 192, 195, 914 P.2d 225, 228 (1996).

³⁰ 190 Ariz. 579, 591-92, 951 P.2d 454, 466-67 (1997).

³¹ 185 Ariz. 192, 195, 914 P.2d 225, 228 (1996).

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appreciated the wrongfulness of his conduct. Therefore, no reasonable jury could have concluded that beyond a reasonable doubt that Sansing did not appreciate the wrongfulness of his conduct.

Sansing also asserts that, if an expert on cocaine addiction were presented to the fact finder, the expert testimony would have created a causal nexus between his drug addiction and the murder. Sansing argues that the expert would have established a reasonable doubt that Sansing could not conform his conduct to the requirements of the law. This is similar to the proposed mitigation in *State v. Medrano*³², where the defendant argued that he could not conform his conduct to the requirements of the law because he was impaired by cocaine use at the time of the murder. Medrano presented expert testimony from a psychiatrist who testified that he was cocaine dependent, and that cocaine use often leads to violence and frequently results in delusions and paranoia. However, the expert testimony was severely undermined and given little weight because most of the information about the effects of the intoxication, and his history of cocaine use came from Medrano himself. The Arizona Supreme Court was skeptical of Medrano's self-serving testimony, noting his obvious motive to fabricate. The court also noted that the defendant's history of cocaine use gave him enough experience to formulate a plausible story about the effects of the cocaine during the commission of the crime.³³

Skepticism is appropriate in evaluating Sansing's claim that drug intoxication affected and impaired his ability to appreciate the wrongfulness of his conduct. Most of the testimony

³² *Id.*

³³ *Id.* at 194, 914 P.2d at 227.

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about Sansing's cocaine use was derived from Sansing. His history of cocaine use provided him with the experience necessary to formulate a favorable story about its effects. As in *Medrano*, any expert testimony would have been grounded on Sansing's testimony. Even if expert testimony had been given, a rational sentencing jury would have recognized that expert conclusions based on Sansing's testimony are marred by Sansing's motive to fabricate self-serving testimony.

In the context of the *Ring II* mandate, the question becomes whether a reasonable jury could find that the mitigation evidence adduced during the penalty phase is sufficiently substantial to call for leniency. Despite the fact that no expert testified about Sansing's tough childhood, drug use, anti-social personality disorders or a causal nexus between his personality disorder and the crime, the factual information regarding Sansing's difficult childhood, his drug use, and the crime was presented to the sentencing judge. Sansing's mitigation specialist had submitted a 21 page report to the sentencing judge detailing meetings with Sansing's family members, as well as his cocaine addiction. Sansing's attempted avoidance of prosecution undermines any argument that he did not understand the wrongfulness of his actions. In addition, no rational jury would have accorded sufficiently substantial weight to Sansing's self-serving testimony. Sansing's assertions are unable to create a reasonable doubt that a rational jury would find the proffered mitigating circumstances sufficiently substantial to call for leniency. Most importantly, the murder of Trudy Calabrese was a horribly cruel murder. It is difficult, if not impossible, to imagine that any reasonable jury would find that the proposed

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mitigating circumstances (assuming that all mitigating circumstances suggested by the defense in this proceeding were proven) were sufficiently substantial to call for leniency in this brutal, cruel crime. I find that no reasonable jury would so find.

IT IS ORDERED DENYING CLAIM 1 (ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL) OF THE DEFENDANT'S SECOND PETITION FOR POST CONVICTION RELIEF.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

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