

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday the 20th day of May, 2021.

Present: All the Justices

Ryan Fair, Appellant,

against Record No. 191487
Circuit Court No. CL19001305-00

Department of Corrections,
Harold Clarke, Director, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Stafford County.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that the judgment of the circuit court should be affirmed.

Ryan Fair pled guilty to charges of second-degree murder, attempted robbery, and use of a firearm in the commission of a felony. He later filed a *pro se* petition for writ of habeas corpus asserting a single claim of ineffective assistance of counsel. Fair alleged that counsel failed to advise him of his right to appeal. Fair stated that “[c]ounsel for the defendant was very aware that after he was sentenced . . . he was very grieved and sought any relief that was a ‘possibility’ at that time.” Fair claimed that he would have appealed had counsel informed him of his right to appeal.

In response, the Director of the Department of Corrections filed a motion to dismiss, which included an affidavit from trial counsel. In it, counsel explained that after sentencing and before the time for appeal expired, he visited Fair at the jail. During this meeting, counsel informed Fair of his right to appeal and the option of filing a motion for reconsideration.

Counsel recalled that Fair responded, “[t]his is God’s Will and it’s in his hands now[.] I’m good.” Counsel remembered this statement because he had never heard something like it from his other clients. About four to five weeks later, Fair’s father contacted counsel and urged him to prepare a motion to reconsider, stating that his son had “too much time.” Counsel then visited Fair again, this time at a state penitentiary, and told Fair about the conversation he had with his father. Counsel recalled that Fair responded by stating he would “handle [his] father” and acknowledged their prior conversation about his sentence being “God’s will.”

Relying on counsel’s affidavit and evidence offered at Fair’s sentencing hearing, the trial court dismissed the petition. After the dismissal order had been entered, Fair asked for an extension of time to procure an affidavit, stating it was “essential to his habeas corpus claim.”

The circuit court never ruled on this motion for extension of time.*

Fair appealed, raising the following single assignment of error:

The Stafford County Circuit Court erred in holding that in filing his claim of ineffective assistance of counsel, Fair failed to demonstrate his counsel’s ineffectiveness.

After we granted Fair’s petition for appeal, we appointed counsel to represent him in the habeas appeal. Appellate counsel argues on brief that the trial court should have awarded Fair an evidentiary hearing. Fair did not ask for an evidentiary hearing in his habeas petition or object when the trial court relied on the affidavit of counsel in dismissing the petition. In addition, the assignment of error does not address the absence of a hearing. Therefore, any contention that the trial court erred in failing to award an evidentiary hearing is procedurally barred by Rules 5:25 and 5:17(c)(1)(i). Fair also argues on appeal that he should have been granted an extension of

* This was apparently Fair’s second extension of time. It does not appear that the circuit court received the first motion for extension of time.

time to secure an affidavit in response to the one filed by the Director. Again, the lone assignment of error does not address the absence of a ruling by the court on the extension of time Fair requested in order to procure an affidavit. Therefore, we are foreclosed from granting relief based on this argument. *See* Rule 5:17(c)(1)(i).

As to the contention that counsel was ineffective in handling a prospective appeal for Fair, relying on Code § 8.01-660, and with no request for an evidentiary hearing, the trial court credited the affidavit of counsel. Counsel's conduct, as set forth in the affidavit, certainly satisfied professional norms with respect to a possible appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).

For all of these reasons, we will affirm the judgment below.

This order shall be certified to the Circuit Court of Stafford County.

A Copy,

Teste:

Douglas B. Robelen, Clerk

A handwritten signature in blue ink, appearing to read "M. M. [unclear] [unclear]".

By:

Deputy Clerk