

THE SUPREME COURT OF ARKANSAS HOLDS THAT STRATEGY  
AND TACTICS ARE NOT CONSIDERED GROUNDS FOR  
INADEQUATE ASSISTANCE OF COUNCIL UNLESS FOUND TO BE  
UNREASONABLE

In *Prater v. State*,<sup>1</sup> the Arkansas Supreme Court affirmed the Circuit Court of Pulaski County's ruling that the appellant's defense counsel was not ineffective when he made decisions based on trial strategy and tactics.<sup>2</sup> Additionally, the court agreed with the circuit court that the State's evidence of the appellant using threats of deception to restrain the victim was sufficient to support a kidnapping conviction.<sup>3</sup>

On July 25, 2008, Chase Prater was ordered to serve a twenty-eight year sentence after he was convicted of rape, kidnapping, sexual assault in the second degree, and felony impersonation.<sup>4</sup> After his conviction and sentence were affirmed on appeal,<sup>5</sup> Prater filed a petition for post-conviction relief in the Pulaski County Circuit Court and "allege[d] three specific instances of ineffective assistance by his trial counsel."<sup>6</sup> First, Prater claimed that his counsel failed to make a directed-verdict motion on the kidnapping charge thereby not properly preserving the issue for appeal.<sup>7</sup> Second, he claimed that his trial counsel failed to impeach the victim's testimony by refusing to introduce certain photographs of the victim posted on social-media sites several days after the rape.<sup>8</sup> Finally, Prater argued that his counsel failed to object to a *Doyle* violation and did not properly prepare him for testimony.<sup>9</sup>

The United States Supreme Court held in *Strickland v. Washington*<sup>10</sup> that for a convicted defendant to prevail on a claim of ineffective assistance of counsel, the petitioner must show that the "counsel's performance was deficient," and that the "errors were so serious as to deprive the petitioner of a fair trial."<sup>11</sup> Here, the court determined that Prater failed to show that his

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1. 2012 Ark. 164, 402 S.W.3d 68.

2. *Id.* at 10, 402 S.W.3d at 75.

3. *Id.* at 15, 402 S.W.3d at 77–78.

4. *Id.* at 1, 402 S.W.3d at 71.

5. *Prater v. State*, 2009 Ark. App. 443, 2009 WL 1478252.

6. *Prater*, 2012 Ark. 164, at 1–2, 402 S.W.3d at 70–71.

7. *Id.* at 1, 402 S.W.3d at 71.

8. *Id.* at 1-2, 402 S.W.3d at 71.

9. *Id.* at 2, 402 S.W.3d at 71.

10. 466 U.S. 688, 104 S.Ct. 2052 (1984).

11. *Prater*, 2012 Ark. 164, at 9, 402 S.W.3d at 74 (quoting *Kemp v. State*, 347 Ark. 52, at 56, 60 S.W.3d 404, at 407).

trial counsel was inadequate, or that he was denied a fair trial as a result of the deficient representation.<sup>12</sup>

With reference to Prater's first argument, the court cited *Eastin v. State*,<sup>13</sup> which established that to allege ineffective assistance of counsel for failing to preserve an issue on appeal, a petitioner must show that there was some basis for filing the particular motion.<sup>14</sup> While Prater contended that the State failed to show that he used the required restraint to establish a conviction of kidnapping, the court concluded that evidence of restraint was properly presented by the State.<sup>15</sup> The State introduced ample evidence that Prater used threats and deception to restrain the victim.<sup>16</sup> Thus, there was sufficient evidence of a kidnapping such that Prater's trial counsel had an adequate basis for not filing a directed verdict on the kidnapping issue.<sup>17</sup>

Prater's second claim was that his trial counsel was ineffective for failing to introduce photographs of the victim at a party several days after the alleged rape.<sup>18</sup> In order to prove ineffective assistance of counsel, Prater had to prove that absent the refusal to introduce the photographs, the finders of fact would have reached a different decision.<sup>19</sup> However, both the trial court and the Supreme Court concluded that the photographs taken of the victim several days after the rape were of "questionable relevance."<sup>20</sup> Additionally, the trial counsel said that he intentionally did not use the photographs because he did not want them to "inflare" the jury.<sup>21</sup> Thus, Prater's counsel made the decision based on his professional judgment, and Prater failed to show that choosing not to introduce the images was unreasonable or would have created significant doubt for the fact-finder.<sup>22</sup>

Prater's final argument was that this trial counsel was ineffective for failing to object to a *Doyle* violation and for not properly preparing him for testimony at trial.<sup>23</sup> In *Doyle v. Ohio*<sup>24</sup> the United States Supreme Court held that using a defendant's silence at the time of arrest, to impeach his testimony, is unconstitutional if the defendant had been assured of his *Miranda*

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12. *Id.* at 15, 402 S.W.3d at 77–78.

13. 2010 Ark. 275.

14. *Prater*, 2012 Ark. 164, at 10–11, 402 S.W.3d at 75 (citing *Eastin*, 2012 Ark. 275, 2, 2010 WL 2210924).

15. *Id.* at 10, 402 S.W.3d at 75.

16. *Id.*, 402 S.W.3d at 75.

17. *Id.*, 402 S.W.3d at 75.

18. *Id.* at 1–2, 402 S.W.3d 70–71.

19. *Id.* at 10–11, 402 S.W.3d at 75–76 (citing *Burton v. State*, 367 Ark. 109, 111, 238 S.W.3d 111, 113 (2006)).

20. *Prater*, 2012 Ark. 164, at 11, 402 S.W.3d at 75–76.

21. *Id.*, 402 S.W.3d at 75–76.

22. *Id.*, 402 S.W.3d at 75–76.

23. *Id.* at 11, 402 S.W.3d at 75–76.

24. 426 U.S. 610, 96 S.Ct. 2240 (1976).

rights upon arrest.<sup>25</sup> Here, the prosecutor repeatedly questioned Prater about his silence after the arrest and Prater's confession that he had not told his side of the story to anyone prior to speaking with his attorney.<sup>26</sup> The Court clearly states that this was a violation of *Doyle*.<sup>27</sup>

However, to prove that Prater's trial counsel was ineffective in failing to object to the prosecutor's questioning, Prater had to prove that the counsel's actions fell below an objective standard of reasonableness, and that had he objected to the questioning, the result of the trial would have been different.<sup>28</sup> Prater's counsel stated that he believed Prater's testimony on the stand at the time of the prosecution's questioning was "going well," and he did not want to object and let the jury "think he was trying to hide something."<sup>29</sup> Thus, the court held that his decision was a trial tactic based on strategy and that despite disagreements between professionals on strategies, the decision was not grounds for a finding of ineffective assistance of counsel.<sup>30</sup>

*Prater v. State* held that defense counsel is not ineffective when decisions are made based on trial strategy, unless the petitioner can prove that alternative action would have resulted in a different outcome.<sup>31</sup> In this case, the court found that Prater's counsel made adequately justified decisions in failing to file a motion for a directed verdict, refusing to introduce photographic evidence, and choosing not to object to a *Doyle* violation.<sup>32</sup> Thus, while advocates may disagree on particular trial strategy, trial counsel may act in accordance with their own tactics as long as they act within an objective standard of reasonableness.<sup>33</sup>

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25. *Prater*, 2012 Ark. 164, at 12, 402 S.W.3d at 76 (citing *Doyle*, 426 U.S. 610, 619 (1976)).

26. *Id.* at 4, 402 S.W.3d at 72.

27. *Id.* at 14, 402 S.W.3d at 77.

28. *Id.* at 14, 402 S.W.3d at 77 (citing *Burnett v. State*, 310 Ark. 202, 832 S.W.2d 848 (1992)).

29. *Id.*, 402 S.W.3d at 77.

30. *Id.* at 14–15, 402 S.W.3d at 77–78.

31. *Prater*, 2012 Ark. 164, at 15, 402 S.W.3d at 77–78.

32. *Id.*, 402 S.W.3d at 77–78.

33. *Id.* at 14, 402 S.W.3d at 77.