

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0595, State of New Hampshire v. Patrick Eschenbrenner, the court on March 12, 2013, issued the following order:

Upon consideration of the defendant's motion for reconsideration, the court hereby modifies as follows the slip opinion issued on February 8, 2013:

1. The following footnote 1 is inserted at the end of the fourth sentence of the fourth paragraph on page 8 of the original slip opinion (*i.e.*, footnote 1 shall be inserted at the end of the following sentence: "It is important to emphasize that the defendant makes no claim that his trial counsel were ineffective in choosing to pursue the aforesaid line of cross-examination."):

1. The defendant did argue in the trial court that his counsel should have objected to Stowell being allowed to testify at all, but he conceded that this alleged error did not amount to ineffective assistance of counsel. However, the defendant never asserted below that, given the fact Stowell did testify as a witness for the State, the cross-examination of Stowell conducted by his trial counsel constituted ineffective representation.

2. Footnote 1 in the original opinion is renumbered as footnote 2.

3. The following footnote 3 is inserted at the end of the parenthetical following the citation of State v. Perron, 122 N.H. 941 (1982), in the first full paragraph on page 10 of the original opinion (*i.e.*, footnote 3 shall be inserted at the end of the following parenthetical: "(not ineffective assistance to open the door to bad character evidence of the defendant)."):

3. The defendant argues that the trial court made factual findings: (1) that the "trial strategy" explanation offered by defendant's lead trial counsel as the reason for not objecting to Stowell's redirect testimony was not credible; and (2) that the "failure to object . . . most likely came from insufficient preparation." He contends that we are bound by these findings. The problem with this argument is that these findings were premised entirely on the trial court's legal conclusion that the defendant's trial counsel could have successfully objected to Stowell's redirect testimony. As explained in the text, that conclusion was erroneous, and the court's reliance on it completely

undercut the basis of its factual findings on the above points.

Moreover, while we readily agree with the defendant that credibility determinations fall within the province of the trial court, see State v. Ayer, 150 N.H. 500, 519 (2006), the fact remains that it was the defendant's burden to establish that his trial counsel's performance was constitutionally deficient. The trial court did not find that trial counsel were ineffective because of the nature of their cross-examination of Stowell; the court faulted counsel only for failing to object to Stowell's redirect examination. Even if we entirely discount trial counsel's testimony as to his trial strategy explanation, the record is devoid of evidence showing how any amount of further preparation by trial counsel would have permitted the defendant to successfully exclude Stowell's redirect testimony given the theory of defense presented at trial and the cross-examination of Stowell pursued in support of that theory.

4. Footnote 2 in the original opinion is renumbered as footnote 4.

In all other respects, the defendant's motion for reconsideration is denied.

Slip opinion modified;
reconsideration otherwise
denied.

Dalianis, C.J., and Hicks, Conboy, Lynn and Bassett, JJ, concurred.

**Eileen Fox,
Clerk**