

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA,

v.

SHANNON STEPHEN,
SPN: 00497502, Defendant.

CASE NO.: CRC06-01591CFAWS
UCN: 512006CF001591A000WS
DIVISION: 3

STATE'S RESPONSE

Comes now, BERNIE McCABE, State Attorney for the Sixth Judicial Circuit of Florida, through his undersigned Assistant State Attorney, and responds to this Court's Order to Respond as follows:

PROCEDURAL HISTORY

On July 14, 2010, Defendant was found guilty following a lengthy jury trial of two counts of DUI manslaughter (counts one and two) and one count of leaving the scene of an accident involving death (count three). That same date, Defendant was sentenced to fifteen years in prison on counts one and two and to five years in prison on count three. Count two was ordered to run consecutively to count one and count three was ordered to run consecutively to count two – for a total for 35 years in prison. Defendant filed a direct appeal and, on October 29, 2014, the Second District Court of Appeal reversed the amount of costs imposed, but affirmed Defendant's judgment and prison sentence. Stephen v. State, 150 So. 3d 268 (Fla. 2d DCA 2014). The Mandate affirming Defendant's judgment and sentence issued on December 2, 2014.

On November 24, 2015, Defendant filed a motion for postconviction relief along with a motion requesting 90 days' leave to amend his motion for postconviction motion. Following several extensions of time, Defendant filed an amended motion for postconviction relief on December 1, 2016, which was stricken by the Court as facially insufficient on December 7, 2016. On December 20, 2016, Defendant filed the instant amended motion for postconviction relief. On May 8, 2017, the Court entered an order denying Grounds Four and Five, reserving ruling on Ground six, and directing the State to respond to Grounds One, Two, and Three. Following extensions of time, the State responds as follows:

ANALYSIS

Claim One: Failure to Call an Accident Reconstruction Expert

Defendant contends that counsel was ineffective for "failing to present an accident reconstruction expert as a defense witness at trial." Defendant alleges that his defense at trial was that another individual,

James Wallace, was driving Defendant's vehicle at the time of the accident and that Wallace and Marvin Dalzell framed Defendant for the crime. Defendant claims that only a reconstruction expert could have properly presented this defense to the jury with the aid of "comprehensive diagrams and visuals," and that only a reconstruction expert would be able to "[tie] these pieces together." Defendant further alleges that he has retained two reconstruction experts who have conducted an analysis and that if their analysis had been presented to the jury, "there is a reasonable probability that the result of the trial would have been something other than a guilty verdict."

Defendant's claim is without merit and should be denied. In reading the entirety of the jury trial transcript, Defendant's theory of defense was very clearly laid out and explained to the jury. Section 90.702, Florida Statutes, states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion..." Here, Defendant's theory of defense – which rests on a timeline of events – does not require scientific, technical, or other specialized knowledge to be understood or explained. In fact, defense counsel himself very clearly and concisely explained to the jury the exact set of facts Defendant now alleges that only an expert could do during closing argument. [State's Exhibit 1, pp. 1651-56]. Counsel's recitation of the evidence elicited at trial that supported Defendant's theory of defense was in no way confusing, convoluted, or difficult to understand. In fact, counsel could not have detailed Defendant's theory of defense any more clearly. As counsel was so adeptly capable of explaining Defendant's theory of defense to the jury, an expert's testimony was not needed and, therefore, counsel was not ineffective for failing to call a reconstruction expert.

Likewise, even assuming, *arguendo*, that counsel had called a reconstructionist expert to testify on Defendant's behalf, there exists no reasonable probability that the outcome of the trial would have been any different. Throughout the entirety of counsel's closing argument, he was able to competently "[tie] these pieces together," for the jury. [State's Exhibit 1, pp. 1602-1660]. The jury had all the information Defendant alleges they should have been presented with; yet they still returned with a guilty verdict. Consequently, Defendant cannot demonstrate that the outcome of the trial would have been different had counsel called a reconstruction expert to testify.

Based upon the foregoing, Defendant has failed to demonstrate both deficient performance and prejudice as required under Strickland and, therefore, Ground One should be denied.

Ground Two: Failure to Call a Cellphone Tower Expert

Defendant contends that counsel was ineffective for failing “to present a cellphone tower expert as a defense witness at trial.” Defendant alleges that the State called two cellphone tower witnesses, Dan Jensen and Youssef Mohamed, to “disprove the Defendant’s assertion that James Wallace was driving the vehicle at the time of the accident by giving theories regarding Mr. Wallace’s location at particular times based on the cellphone tower that Mr. Wallace’s cellphone was hitting.” Defendant argues that counsel should have retained a cellphone tower expert to refute the testimony of the State’s witnesses. Defendant contends that had counsel done so, the outcome of the trial would have been different.

Defendant’s claim is without merit and should be denied. Counsel retained, not one, but two cellphone tower experts, Heather Diaz and Steven Smoot, both of whom were deposed by the State and their depositions are filed in the court file. In her deposition, Heather Diaz testified that she could not authenticate the data in the Viador report, not that the data was false or incorrect, despite the fact that Sprint had certified and authenticated the Viador report itself. [State’s Exhibit 2, pp. 41-2]. Diaz further testified that she had never testified about Viador evidence before and had never personally pulled a Viador report herself. [State’s Exhibit 2, p. 43]. Diaz testified that there was no indication that Wallace’s phone used any other cellphone towers than the one’s reported in Sprint’s certified Viador report and that she did not know the cellphone tower’s actual radius. [State’s Exhibit 2, pp. 51-3, 59-60]. In reading Diaz’s deposition, it is clear that her primary contention with the State’s evidence was that she could not authenticate Sprint’s certified Viador report – not that it contained false information – and was further basing her onions on industry standards – not her personal knowledge of Sprint’s cellphone towers that registered Wallace’s phone. Diaz could not conclude that Wallace’s phone calls were made at the scene of the accident. [State’s Exhibit 2].

Similarly, Steven Smoot testified that he began his analysis of Wallace’s cellphone calls under the assumption that Wallace was at the scene of the offense. [State’s Exhibit 3, pp. 27-30]. Most notably, when questioned about the probability that Wallace’s phone call was made at location different than the one reported in the viador report, Smoot testified that at first he thought there was “[a] higher probability that this particular call was made outside this sector....But since then, after looking at the technical evidence from the antenna manufacturer, [he] reduced [his] expectation of that probability to below fifty percent.” [State’s Exhibit 3, p. 54, 55-56]. When asked if he would be testifying at trial that Wallace’s cellphone call definitely came from outside the cellphone tower indicated on the Viador report, Smoot answered, “No, that’s an easy answer. I would not declare that it was definitely outside of there.” [State’s Exhibit 3, p. 55].

The record makes clear that counsel did in fact retain two cellphone tower experts, but neither expert was able to refute the State's experts and definitively say that Wallace was somewhere else other than where the cellphone towers placed him when he made his initial phone call and subsequent calls. In fact, they were only able to opine that there was a less than fifty percent chance that that scenario actually occurred. [State's Exhibit 2 and 3]. Counsel did retain experts in an attempt to refute the State's experts, but the retained experts were unable to do so and counsel is not ineffective for relying on the opinions of his retained experts. Floyd v. State, 18 So. 3d 432, 454 (Fla. 2009) ("Trial counsel's investigation into mental-health mitigation 'is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert.'). Furthermore, counsel cannot be deemed ineffective for failing to call experts who were not going to provide favorable testimony for Defendant at trial. Id. at 453-54.

Based upon the foregoing, Defendant has failed to demonstrate both deficient performance and prejudice as required under Strickland and, therefore, Ground Two should be denied.

Ground Three: Failure to Call a Toxicologist

Defendant contends that counsel was ineffective for "failing to present a toxicologist as a defense witness during the trial." Defendant alleges that following the accident, the vehicle was driven an additional mile down the road. Defendant alleges that liquid leaked from the vehicle onto the pavement, "leaving visual evidence of the path that the vehicle took," and that "[t]he liquid path is in a straight line." Defendant argues that given his level of intoxication, "there is no way that he could have driven the vehicle in a straight path," and the fact that the fluid falls in a straight line further proves his theory of defense that it was actually James Wallace who was driving the vehicle that night. Defendant alleges that a toxicologist would have been able to explain to the jury that given Defendant's level of intoxication that night, he "could *not* have driven the vehicle in a straight line following the accident." (emphasis in original). Defendant argues that had counsel called a toxicologist to testify, the outcome of the trial would have been different.

Defendant's claim is without merit and should be denied. At trial, counsel thoroughly questioned Corporal Michael Styers about the path of the liquid leaked from Defendant's vehicle. Corporal Styers testified that he "noticed a fluid trail that traveled from [the scene of the collision] and traveled all the way up to 54 and Grand to where there was an area of what appeared to be pooling area. And then from across the street across State Road 54 is where the truck came to final rest when it became totally disabled." [State's Exhibit 1, p. 1268]. Corporal Styers further testified that the fluid line measured "right at a mile," and while the line "did not - - it wasn't a total weave or anything like that," the line was straight in that "it was within the southbound lane." [State's Exhibit 1, p. 1270-71]. During closing argument, counsel argued that the fact that the liquid leaked in a straight line supports Defendant's theory that Wallace was driving the vehicle that

night. [State's Exhibit 1, pp. 1608, 1610]. Notably, the State objected to counsel's arguments regarding what an individual as intoxicated as Defendant was capable of doing. [State's Exhibit 1, pp. 1611]. Counsel argued that the jury "can use their common sense. They have all observed people under the influence. That is not something that requires expert testimony...." [State's Exhibit 1, pp. 1611-12]. The trial court then overruled the State's objection and allowed counsel to continue with his argument. [State's Exhibit 1, p. 1612]. Similar to Defendant's allegation in Ground One, the argument that the fluid leaked in a straight line, because another, more sober, individual was driving the vehicle does not require an expert to understand; a point which counsel specifically argued in closing argument and with which the trial court agreed. Accordingly, counsel cannot be deemed ineffective for failing to call a toxicologist expert when one was not needed.

Additionally, Defendant's allegation is premised upon a speculative, if not potentially faulty, series of assumptions. Defendant argues that the fluid leaked onto the pavement in a straight line; therefore, the only possible explanation for that straight line is that the vehicle drove in a straight line which would have required a driver who was capable of driving in a straight line. However, there exists any number of factors that would have affected the path of the leaked fluid, such as the angle or tilt of the pavement, or the weight and viscosity of the fluid, or the weather conditions on that evening, or where on the vehicle the liquid leaked from, or whether there was one or multiple punctures causing the leak, or even the condition of the vehicle at the time of the leak. In this case, the testimony at trial indicated that the vehicle sustained major, visible damage after impacting the victims and that it came to a stop because it could no longer operate. [State's Exhibit 1, pp. 581-82, 690-92, 1031, 1268, 1634]. Given the severe damage to the vehicle, and all of the other possible factors in determining how the liquid landed on the pavement, it is unreasonable for Defendant to suggest that the only possible way for the fluid to have leaked in a straight line is because the vehicle drove in a straight line and, therefore, the driver was capable of driving in a straight line. Defendant's theory rests upon an impermissible stacking of inferences and unreasonably relies on speculation, which cannot stand as the basis for postconviction relief. Jones v. State, 845 So. 2d 55, 64 (Fla. 2003) ("Postconviction relief cannot be based on speculative assertions."); Bruno v. State, 807 So. 2d 55, 67 (Fla. 2001) ("Mere speculation regarding possible error is not enough to satisfy Strickland."); Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005); Solorzano v. State, 25 So. 3d 19, 23 (Fla. 2d DCA 2009); Bass v. State, 932 So. 2d 1170, 1172 (Fla. 2d DCA 2006)("[P]ure speculation cannot be a basis for postconviction relief.").

Similarly, Defendant's argument that this straight line of fluid supports his theory that Wallace was actually driving the vehicle cannot be reconciled with Valerie Herbert's testimony. Herbert testified that around 1:00am, several minutes before the accident, she witnessed Defendant's truck driving "all over the road, completely erratic, bouncing from the median back to the other side of the road, back and forth across

all three lanes.” [State’s Exhibit 1, pp. 523]. She testified that she was so concerned by Defendant’s driving pattern that she called 911. [State’s Exhibit 1, p. 526]. According to Herbert, prior to the accident, the driver of the vehicle – whether it was Defendant or, as Defendant contends, Wallace – was so intoxicated they could not drive in a straight line or even within the lane itself. Yet, based on Defendant’s allegation, this same driver, was then able to drive in a straight line just a few minutes later after it collided with the victims. It is unreasonable for Defendant to suggest that he was unable to drive in a straight line because he was intoxicated while simultaneously arguing that Wallace was capable of driving in a straight line when the driver of the vehicle – again, whether it was Defendant or Wallace – was so intoxicated their reckless driving prompted another driver on the road to call 911 just minutes before the accident occurred. Under either theory, the driver of the vehicle was so intoxicated they were driving erratically all over the road, but Defendant would argue that he was incapable of driving in a straight line while intoxicated and Wallace was capable of driving in a straight line while intoxicated. Defendant’s contention is illogical and unreasonable and courts are not required to hold evidentiary hearings on objectively unreasonable postconviction claims. Capalbo v. State, 73 So. 3d 838, 841 (Fla. 4th DCA 2011).

Based upon the foregoing, Defendant has failed to demonstrate both deficient performance and prejudice as required by Strickland and, therefore, Ground Three should be denied.

Lastly, as a final matter relating to all of the above Grounds, Defendant was very involved in his trial. He was routinely questioned by the trial court throughout the entirety of the trial regarding counsel’s representation and his understanding of the trial proceedings. During one of these colloquies, which occurred after counsel indicated that no further witnesses would be called other than potentially Defendant, Defendant acknowledged to the trial court that he was satisfied with counsel’s representation. [State’s Exhibit 1, pp. 1447, 1470]. When Defendant made his acknowledgement of satisfaction to the trial court, he was very well aware that none of the above experts had been called in his case and further knew that none of them were going to be called. Defendant’s allegations now are nothing more than an attempt to go behind his sworn representations to the trial court at the time of his trial.

WHEREFORE, the State contends that, based upon the aforementioned argument and caselaw, Defendant’s motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing response has been furnished to Don Pumphrey, Jr., and Michael Ufferman, Attorneys for Defendant, and with the Clerk of the Court through the E-filing portal on this 21st day of December, 2017.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

/S/ Sara Waechter
Sara Waechter
Assistant State Attorney
Bar No. 89093
P.O. Box 5028
Clearwater, FL 33758
(727) 464-6816
SA6appealeservice@co.pinellas.fl.us