

IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHANNON STEPHEN,

Petitioner,

v.

SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No.: 8:20-cv-727-T-33CPT

PETITIONER STEPHEN'S REPLY TO THE RESPONDENTS' RESPONSE

The Petitioner, SHANNON STEPHEN, by and through undersigned counsel, submits the following reply to the Respondent's response (Doc 13) to his federal habeas corpus petition filed pursuant to 28 U.S.C. § 2254.

Ground 1. Defense counsel rendered ineffective assistance of counsel by failing to present an accident reconstruction expert as a defense witness at trial.

For all of the reasons set forth in the § 2254 petition, Petitioner Stephen continues to assert that defense counsel was ineffective for failing to present an accident reconstruction expert as a defense witness at trial. As explained in the § 2254 petition, in order to properly present the theory of defense that James Wallace was driving his vehicle at the time of the accident, the jury was required to understand and comprehend the timeframes involved, the routes driven by all parties, and the cellphone data from each of the parties. The only way to effectively present all of this information was through an accident reconstruction expert.

However, at trial, defense counsel did *not* present an accident reconstruction expert as a defense witness at trial (i.e., defense counsel did not present any witness or expert who introduced comprehensive diagrams and visuals, maps, data regarding the timing of the routes in question, or testimony/evidence tying all of this evidence together).

In his response, the Respondent merely repeats the conclusions by the state postconviction court – conclusions that were drawn without first conducting an evidentiary hearing. (Doc 13 - Pgs 14-17). In its order summarily denying this claim, the state postconviction court concluded that defense counsel at trial “elicited testimony from various witnesses” and “argue[d] to the jury[] the timeline which supported the defense theory, such that there is no reasonable probability that the outcome of the trial would have been different if an accident reconstruction expert had in fact testified.”¹ (Doc 14-4 - Pg 18). As explained in the § 2254 petition, (1) *the State presented its own accident reconstruction expert at trial* (John Murdoch), but defense counsel failed to present an accident reconstruction expert – and an accident reconstruction expert was needed to properly present Petitioner Stephen’s theory of defense in this case; (2) “elicit[ing] testimony from various witnesses” is *not* the same as affirmatively presenting testimony from an expert witness who would opine that the timeline of events matches the defense’s theory regarding the routes taken by Mr. Wallace

¹ In essence, the state postconviction court concluded that defense counsel made a “strategic” decision that an accident reconstruction expert was unnecessary in this case. “A trial court cannot deny a motion for post-conviction relief by finding that defense counsel’s decision was tactical or trial strategy *without first holding an evidentiary hearing.*” *Button v. State*, 941 So. 2d 531, 533 (Fla. 4th DCA 2006) (emphasis added) (citation omitted). *See also Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000) (“Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts’ determination that Barnes’s trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of *Strickland* [*v. Washington*, 446 U.S. 668, 687 (1984)].”).

and Mr. Dalzell, *see Leonard v. State*, 930 So. 2d 749, 751-752 (Fla. 2d DCA 2006);² (3) the state postconviction court’s conclusion focuses on what defense counsel told the jury during his closing argument – but during the trial (and just before closing argument), the state trial court instructed the jury that “what the attorneys say is *not* evidence.” (Doc 14-6 - Pg 973); and (4) the feasibility of the defense’s theory (i.e., that Mr. Wallace was driving Petitioner Stephen’s vehicle and Marvin Dalzell followed behind in his vehicle) was dependant upon establishing the *timing* of the routes taken by these men – and only an accident reconstruction expert could have conclusively confirmed that the route(s) proposed by the defense could be driven within the relevant timeframe – thereby refuting the State’s assertion that the defense’s theory was impossible.

Petitioner Stephen has submitted with his § 2254 petition a PowerPoint presentation prepared by Don Fournier, an accident reconstruction expert. (Doc 9). Petitioner Stephen’s theory of defense is that Mr. Wallace and Mr. Dalzell left the bar with Petitioner Stephen in Petitioner Stephen’s truck, they went to Mr. Wallace’s house so that Mr. Dalzell could get in his van and then subsequently meet Mr. Wallace – who was driving Petitioner Stephen’s vehicle with Petitioner Stephen in the front passenger seat – at breakfast (Denny’s, which was a location known to both Mr. Wallace and Mr. Dalzell), and, on the way to breakfast,

² In *Leonard*, the state appellate court specifically rejected the reasoning employed by the state postconviction court in the instant case:

[T]he fact that Leonard was able to introduce some evidence in support of his theory of defense *does not negate his claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.*

(Emphasis added).

Mr. Wallace, while driving a route that allowed him to check the whereabouts of his wife, struck the victims. At trial, the State argued that it was *impossible* – from a timing standpoint – for Petitioner Stephen’s theory to be true (i.e., “Mr. Foote, you got it all discombobulated[, y]ou got the timelines all wrong.”). Thus, in order to refute the State’s assertion, it was necessary for defense counsel to present an expert like Mr. Fournier to verify that the timing of the defense’s theory matched the other evidence in the case – and specifically the time of night that the victims were struck by the vehicle. In Mr. Fournier’s presentation, he explains the timing of the route(s) proposed by the State and the route(s) proposed by the defense – with information/diagrams regarding stop lights and testimony regarding test routes that were driven at the time of day in question. Mr. Fournier has now confirmed that the route(s) proposed by Petitioner Stephen could be driven within the relevant timeframe – thereby refuting the State’s assertion that the defense’s theory was impossible. Mr. Fournier should be afforded an opportunity to present his analysis to the Court during an evidentiary hearing.

Notably, during the prosecutor’s rebuttal closing argument, the prosecutor argued that defense counsel’s closing argument was “discombobulated” and that he “got the timelines all wrong.” (Doc 14-6 - Pg 1,060). A review of the closing argument supports the prosecutor’s conclusion – defense counsel’s closing argument was rambling and difficult to follow (i.e., it was, in fact, “discombobulated”). Imagine how much better defense counsel’s closing argument would have been had defense counsel been able to say to the jury:

The State argues that our theory of defense is impossible from a timing standpoint. But you heard the testimony of Mr. Fournier – an engineer and expert in accident reconstruction. Mr. Fournier compared the routes in this case and analyzed the timing of the routes, and he concluded that the

defense's theory about Mr. Wallace driving the vehicle at the time of the accident is absolutely consistent with all timeframes. Ladies and gentlemen of the jury, Mr. Fournier's testimony establishes reasonable doubt.

However, because defense counsel did not have an expert like Mr. Fournier, he could not make such an argument – and, in the words of the prosecutor, defense counsel's closing argument ended up being “discombobulated” – and ultimately ineffective.

Petitioner Stephen prays the Court to grant an evidentiary hearing – something that he was improperly denied in state court. After hearing directly from Mr. Fournier, the Court can properly assess whether defense counsel was ineffective and whether Petitioner Stephen was prejudiced by counsel's ineffectiveness.

Ground 2. Defense counsel rendered ineffective assistance of counsel by failing to present a cellphone tower expert as a defense witness at trial.

For all of the reasons set forth in the § 2254 petition, Petitioner Stephen continues to assert that defense counsel was ineffective for failing to present a cellphone tower expert as a defense witness at trial.³ As explained in the § 2254 petition, the first trial in this case ended in a hung jury/mistrial, and the two main differences between the first trial and the second trial were (1) defense counsel's failure to introduce during the trial the receipt from the bar (as explained in Ground 4) and (2) cellphone tower witnesses that the State presented during the second trial (Dan Jensen and Youssef Mohamed). These cellphone tower witnesses relied on a Viador report and attempted to disprove Petitioner Stephen's assertion that James Wallace was driving the vehicle at the time of the accident by giving theories

³ In his response, the Respondent contends that this claim was not properly presented in state court. (Doc 13 - Pgs 18-19). The Respondent's contention is clearly refuted by the state court postconviction pleadings. In his state postconviction motion, Petitioner Stephen clearly and unequivocally argued that defense counsel was ineffective for failing to present a cellphone tower expert as a defense witness at trial.

regarding Mr. Wallace's location at particular times based on the cellphone tower that Mr. Wallace's cellphone was hitting (i.e., the State's witnesses opined that Mr. Wallace's cellphone was not near the accident site but rather was near Mr. Wallace's house). However, defense counsel failed to present a cellphone tower expert to refute this testimony – even though defense counsel had two experts (Steven Smoot and Heather Diaz) at his disposal.

In his response, the Respondent merely repeats the conclusions by the state postconviction court – conclusions that were drawn without first conducting an evidentiary hearing. (Doc 13 - Pgs 21-23). In its order summarily denying this claim, the state postconviction court concluded that neither Mr. Smoot nor Ms. Diaz provided any testimony that would have refuted the State's theory that the cellphone tower records demonstrated that Mr. Wallace was not the individual driving when the accident occurred. (Doc 14-4 - Pg 21). As argued in the § 2254 petition, the state postconviction court's assertion is completely contrary to the statements made by Mr. Smoot and Ms. Diaz during their depositions. For example, during his deposition, Mr. Smoot opined that (1) the 1:09 a.m. call made by Mr. Wallace was "probably closer to the site of the accident" (i.e., was not close to the cellphone tower by Mr. Wallace's house); (2) directional antennas are not always perfect; (3) there was almost a fifty percent chance that the 1:09 a.m. call was placed from a location outside of the range of the cellphone tower by Mr. Wallace's house; (4) it is "not always true" that a cellphone connects to the cellphone tower that is closest in location to the cellphone; and (5) attempts to determine a person's location using cellphone tower triangulation are "very inaccurate." (Doc 14-3 - Pgs 191, 201, 226-227, 239, 247). Similarly, during her deposition, Ms. Diaz opined that: (1) a cellphone will connect with a cellphone tower that has the strongest signal – which will not necessarily be the closest tower; (2) the cellphone data

being utilized by the State “does not accurately provide location”; (3) the Viador report relied upon by the State is “missing significant what’s called test methods for the digital evidence” and thus the report cannot be authenticated; (4) the Viador report relied upon by the State could have been manually fabricated; (5) the Viador report “cannot accurately reflect the location of the cellphone device”; and (6) Sprint has a disclaimer that says “[t]he information is provided from our CDR archive system, this stored data is not designed as a complete backup, nor is it used to track call activity” and that the information “may not necessarily be complete.” (Doc 14-3 - Pgs 122, 139-141, 158, 162).⁴ It is hard to fathom why the state postconviction court thought that the testimony of Mr. Smoot and Ms. Diaz would not have been helpful to Petitioner Stephen. During the second trial, the State introduced witnesses who opined that based on the Viador report, it was their opinion that Mr. Wallace was *not* at the accident scene (as suggested by defense counsel) but rather was at home. *Clearly it*

⁴ The state postconviction court stated that during the trial, defense counsel – on cross-examination – was able to “obtain concessions” from the State’s cellphone tower witnesses. (Doc 14-4 - Pg 23). As explained in Ground 1, in *Leonard*, 930 So. 2d at 751-752, the state appellate court specifically rejected the reasoning employed by the state postconviction court:

[T]he fact that Leonard was able to introduce some evidence in support of his theory of defense *does not negate his claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.*

(Emphasis added). As in *Leonard*, in the instant case, “the fact that [defense counsel] was able to introduce some evidence in support of [Petitioner Stephen’s] theory of defense [by “obtaining concessions” from the State witnesses] does not negate [Petitioner Stephen’s] claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State’s theory.” *Id.* Moreover, a comparison of the alleged “concessions” cited by the state postconviction court and the eleven opinions offered by Mr. Smoot and Ms. Diaz during their depositions (listed above) shows that the alleged “concessions” were nowhere near as strong as the eleven opinions offered by Mr. Smoot and Ms. Diaz.

would have been helpful for Petitioner Stephen to discredit the testimony of these State witnesses by presenting defense experts who would have opined that cellphone tower triangulation is “very inaccurate” and the Viador report was incomplete and could not be authenticated (and was possibly even fabricated).

As argued in the § 2254 petition, the record clearly demonstrates that defense counsel had at his disposal the testimony of experts who would have refuted the State’s cellphone tower testimony. Defense counsel, however, failed to present these experts. Because the state postconviction court refused to hold an evidentiary hearing on this claim, the question of why defense counsel failed to present these experts is unanswered. Thus, the Court should grant an evidentiary hearing on this claim so that the Court can ascertain defense counsel’s reasoning for failing to present a cellphone tower expert at trial. As explained by the Sixth Circuit Court of Appeals in *Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000), without conducting an evidentiary hearing, it is impossible to determine whether counsel’s actions were reasonable:

Barnes argues that he was denied effective assistance of counsel by his trial attorney’s failure to investigate or call a medical witness to establish Barnes’s inability to run in the manner that the complainant testified her assailant had run. It is unclear from the record whether or to what extent trial counsel investigated Barnes’s medical condition, and why he failed to contact Dr. Waring. *Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel’s failure to investigate and call Dr. Waring was sound trial strategy, or was constitutionally deficient performance.* Given Dr. Waring’s ability to testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness. *Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts’ determination that Barnes’s trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of Strickland [v. Washington, 446 U.S. 668, 687 (1984)].*

(Emphasis added) (citations omitted).

Ground 3. Defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist as a defense witness at trial.

For all of the reasons set forth in the § 2254 petition, Petitioner Stephen continues to assert that defense counsel was ineffective for failing to present a toxicologist as a defense witness at trial. As explained in the § 2254 petition, (1) the vehicle in question was driven for approximately one mile after the accident, (2) liquid from the vehicle leaked on the pavement, and the liquid path is in a straight line; (3) given Petitioner Stephen's intoxication level, there is no way that he could have driven the vehicle in a straight path – which further proves that James Wallace was driving Petitioner Stephen's vehicle at the time of the accident; and (4) had defense counsel presented a toxicologist, the toxicologist would have explained to the jury that given Petitioner Stephen's intoxication level, Petitioner Stephen could *not* have driven the vehicle in a straight line following the accident.

In his response, the Respondent merely repeats the conclusions by the state postconviction court – conclusions that were drawn without first conducting an evidentiary hearing. (Doc 13 - Pgs 24-28). In its order summarily denying this claim, the state postconviction court stated that “by way of the testimony from defense witness, Corporal Styers, the jury heard, in some form, the same evidence the Defendant now claims, only a toxicologist, could present to the jury,” (Doc 14-4 - Pg 25) and the state postconviction court asserted that there was other evidence presented at trial (i.e., the testimony of Valerie Herbert) that the vehicle in question was being driven in an erratic manner. (Doc 14-4 - Pg 25). As explained in the § 2254 petition, (1) a review of pages 1267-1272 of the trial transcript (Doc 14-6- Pgs 658-663) reveals that Corporal Styers merely told the jury that he observed a liquid trail from the vehicle that was in a relatively straight line, but Corporal

Styers – who is not a toxicologist – did not give *any testimony* about (a) Petitioner Stephen’s intoxication level or (b) the impact that such an intoxication level would have on a person’s ability to engage in activities, such as driving a vehicle in a straight line and (2) the fact that there is evidence in the record that may be contrary to the assertion that the liquid leaked from the vehicle shows that the vehicle was driven in a straight line is not a basis for denying Petitioner Stephen’s claim; rather, the trial testimony cited by the state postconviction court is another reason that an evidentiary hearing is needed to resolve this claim. *See Coley v. State*, 74 So. 3d 184 (Fla. 2d DCA 2011).⁵

Petitioner Stephen requests the Court to grant an evidentiary hearing on this claim.

Ground 4. Defense counsel rendered ineffective assistance of counsel by failing to admit the bar receipt into evidence.

For all of the reasons set forth in the § 2254 petition, Petitioner Stephen continues to assert that defense counsel was ineffective for failing to admit the bar receipt into evidence (because defense counsel failed to subpoena a witness who could properly authenticate the receipt). As explained in the § 2254 petition, the first trial in this case ended in a hung

⁵ In *Coley*, the state appellate court stated:

Gay’s testimony would have supported Coley’s assertion at trial that the State’s witnesses identified the wrong person. Nothing in the attached portions of the trial record would conclusively refute Gay’s assertion that he was present but hidden at the time of the shooting. Furthermore, *while Gay’s credibility may be called into question based on conflict with testimony adduced at trial, such conflict is necessarily an evidentiary matter that must be weighed after a hearing and is not proper grounds for denial at the summary stage of the proceeding. See McLin v. State*, 827 So. 2d 948, 955 (Fla. 2002) (holding that trial court erred in rejecting newly discovered testimony without evidentiary hearing when affidavit was not inherently incredible or obviously immaterial to defendant’s claim).

Coley, 74 So. 3d at 185 (emphasis added).

jury/mistrial – and one of the main differences between the first trial and the second trial was defense counsel’s failure to introduce during the trial the receipt from the bar. The bar receipt shows the time that Petitioner Stephen left the bar (and confirms Petitioner Stephen’s timeline and is therefore consistent with Petitioner Stephen’s theory that James Wallace was driving Petitioner Stephen’s vehicle at the time of the accident). Notably, during the jury’s deliberation, the jury asked “what was the time registered on the bar tab” (Doc 14-6 - Pg 1,118), but because defense counsel failed to introduce the bar receipt, the trial court was required to answer the jury’s question by saying “all of the evidence that has been entered in this trial is back with you.” (Doc 14-6 - Pg 1,119). Had defense counsel properly admitted the bar receipt into evidence (as he did during the first trial), and had the jury been able to view the time on the receipt to see that it was consistent with Petitioner Stephen’s theory of events, then there is a reasonable probability that the result of the trial would have been something other than a guilty verdict. The bar receipt that was introduced during the first trial is attached as an exhibit to this reply.

In his response, the Respondent merely repeats the conclusions by the state postconviction court. (Doc 13 - Pgs 29-33). Notably, the Respondent asserts that “[t]he trial court concluded that trial counsel could not be ineffective for failing to do something that he tried to do.” (Doc 13 - Pgs 29-30). Contrary to the Respondent’s assertion, regardless of what defense counsel “tried to do,” defense counsel was clearly ineffective for failing to properly do something that any reasonable attorney would have done in this case – authenticating the bar receipt by presenting the employee from the bar who issued the receipt on the night in question. The state postconviction court concluded in its order that Petitioner Stephen was not prejudiced by defense counsel’s failure to introduce the bar receipt into

evidence, asserting that (1) defense counsel cross-examined State witnesses in an effort to show what time Petitioner Stephen left the bar and (2) defense counsel – during closing arguments – argued the “timeline of events.” (Doc 14-4 - Pg 19). As explained in the § 2254 petition, (1) a review of the portions of the trial transcript attached to the state postconviction court’s order establishes that defense counsel was *not successful* – through cross-examination – in establishing the exact time that Petitioner Stephen left the bar;⁶ (2) nowhere in the closing argument excerpt quoted by the state postconviction court did defense counsel even mention the time that the group left the bar; and (3) the jury’s question during deliberations shows that the jury clearly wanted to know the *exact time* the group left the bar (presumably because defense counsel was unable to establish the exact time by questioning the witnesses) – and because defense counsel failed to introduce the bar receipt, the state trial court was required to answer the jury’s question by saying “all of the evidence that has been entered in this trial is back with you.” (Doc 14-6 - Pg 1,119).

Thus, for the reasons set forth above and contained in the § 2254 petition, Petitioner Stephen is entitled to relief on this claim. Petitioner Stephen requests the Court to grant an evidentiary hearing.

⁶ On page 791 of the trial transcripts, Mr. Wallace said that the group left the bar “around quarter to 1:00 or so.” (Doc 14-6 - Pg 177). The state postconviction court cited pages 820-829 of the trial transcript, but those pages have nothing to do with the time that the group left the bar. (Doc 14-6 - Pgs 207-216). On page 1041 of the trial transcript, Mr. Dalzell “[g]uesstimated” that the group left the bar at “around 11:45, 12:00” (Doc 14-6 - Pg 430); on page 1042 of the trial transcript, he again said the group left the bar around midnight (Doc 14-6 - Pg 431); and then on page 1074 of the trial transcript, he said that the group left the bar at 12:45. (Doc 14-6 - Pg 463). While defense counsel may have attempted to “pin down” the time that the group left the bar by asking these questions of the witnesses, defense counsel was only able to establish an approximate time – whereas the bar receipt would have established the *exact* time.

Ground 5. Defense counsel rendered ineffective assistance of counsel by failing to obtain a protective order for witness Kara Wallace's cellphone texts.

For all of the reasons set forth in the § 2254 petition, Petitioner Stephen continues to assert that defense counsel was ineffective for failing to obtain a protective order for witness Kara Wallace's cellphone texts.

Ground 6. The state trial court erred by denying Petitioner Stephen's motion to suppress.

For all of the reasons set forth in the § 2254 petition, Petitioner Stephen continues to assert that the state trial court erred by denying his motion to suppress. *See Murray v. State*, 838 So. 2d 1073 (Fla. 2002). In his response, the Respondent asserts that this claim is barred:

But exhaustion of the ground in state court bars review of the Fourth Amendment claim under *Stone v. Powell*, 428 U.S. 465 (1976).

(Doc 13 - Pg 36). Contrary to the Respondent's assertion, Petitioner Stephen is not raising a Fourth Amendment claim; rather, he is raising a due process claim based on the State's utilization of evidence that had been tampered with.

Ground 7. The cumulative effect of the errors in this case deprived Petitioner Stephen of a fair trial.

Petitioner Stephen continues to assert that all of the errors in his case, considered either individually or together, resulted in him being denied a fair trial. *See Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979); *Cargle v. Mullin*, 317 F.3d 1196, 1206-1207 (10th Cir. 2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been
furnished to:

Assistant Attorney General Kelly Elizabeth O'Neill
by CM/ECF electronic delivery this 13th day of August, 2020.

Respectfully submitted,

/s/ Michael Ufferman

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