STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

DAMEION J. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002353

REPLY BRIEF OF PETITIONER

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Background

Respondent contends that "Counsel cannot be expected to interview what are seemingly hostile witnesses who have given sworn-to, incriminating statements to law enforcement without any indication that [the] incriminating statement was coerced or otherwise fallacious." Brief of Respondent 11. Respondent further suggests that counsel should only be required to interview favorable witnesses. Id. Petitioner craves reference to a provision of law in support of these statements. Although not binding, the American Bar Association Criminal Justice Standards, section 4-4.1(a) provides:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Koon v. Cain, 277 F. App'x 381, 386–87 (5th Cir. 2008).

Numerous other jurisdictions have held that a failure to conduct a complete investigation, including interviewing witnesses, constitutes ineffective assistance of counsel. Respondent does not cite to, and the undersigned cannot locate, any binding precedent that relieves an attorney from the obligation of conducting a full and thorough investigation.

Respondent represents that counsel's investigation was reasonable, a description belied by testimony at the PCR evidentiary hearing. Petitioner noted, and plea counsel confirmed, that counsel never spoke with Kenneth Louallen nor sincerely attempted to track down Louallen's statement. App. 175 l. 10 – App. 176 l. 21; App. 227 l. 4 – App. 228 l. 12. Counsel did not have

an investigator work on this case with him. App. 230 ll. 6 – 22. Similar to Louallen's statement, counsel never spoke to Kory Little, either. App. 180 ll. 3 – 23; App. 224 ll. 9 – 10.

Contrary to the state's belief that counsel's investigation was reasonable, counsel admitted that his advice to Petitioner would have been different had he undertaken a full investigation, to include interviewing eyewitnesses:

> Q: What - - if you had known [Little] was willing to recant that statement because they put undue pressure on him, wouldn't let him go to the bathroom, wouldn't let him get anything to eat, promise not to or threaten to include him on it if he didn't do it, would that have given you any ground to advise him, Mr. Rivers, differently?
>
> A: Yes, sir.

App. 225 ll. 9 – 15. Similar testimony was elicited from plea counsel near the conclusion of his direct examination at the PCR evidentiary hearing:

> Q: [B]ased on the hearing today, Kory Little saying what he said that his statement was not accurate that he gave and based on Billy Lee Lisenby saying he was there, he saw the victim with a gun acting aggressively, based on that information which is the information you didn't have at the time, would you have advised Mr. Rivers differently about … taking a plea or going to trial?
>
> A: I think so.

App. 234 ll. 1 – 11. Counsel admitted that he did not have that information at the time. App. 234 ll. 17 – 23.

Discussion

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)); see also Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that

counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland at 690, 104 S.Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986) aff'd, 828 F.2d 670 (11th Cir. 1987) (emphasis in original).

In Ard v. Catoe, the South Carolina Supreme Court affirmed the PCR court's grant of relief wherein counsel should have further investigated. 372 S.C. 318, 332, 642 S.E.2d 590, 597. Trial counsel in that case failed to discuss gunshot residue analysis with their expert witness. Id. at 333-34, 642 S.E.2d 590, 597-98. As alluded to above, additional parts of the country hold attorneys to similar standards.

The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer,' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made. See United States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974); Williams v. Florida, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970); Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting).

"Witness are at the heart of virtually every criminal investigation and trial. Through them it can be learned whether a crime occurred, when it occurred, and who might have committed the crime." Major MacDonnell, It Is Not Just What You Ask, but How You Ask It: The Art of Building Rapport During Witness Interviews, Army Law., AUGUST 1999, at 65, 65.

Since Strickland, the Supreme Court has several times found that an attorney's failure to prepare or investigate witnesses or evidence was deficient performance. See, e.g., Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 452–53, 175 L.Ed.2d 398 (2009) (per curiam); Rompilla v. Beard, 545 U.S. 374, 385, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 523–25, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The Seventh Circuit and others have found that an attorney's failure to interview prospective witnesses can render his performance deficient under Strickland. See, e.g., Davis v. Lambert, 388 F.3d 1052, 1063–64 (7th Cir.2004) ("As Davis relied exclusively on a theory of self-defense at trial, his counsel's failure to interview Perry, the only other eye-witness to the altercation, is inexplicable."); Washington v. Smith, 219 F.3d 620, 632 (7th Cir.2000) ("failure to try to ascertain what exculpatory evidence 'new' witnesses might have [was a] flagrant example [ ] of ineffective assistance"); Sowell v. Anderson, 663 F.3d 783, 790 (6th Cir.2011) (granting habeas relief and holding that "[c]ounsel's failure to interview Sowell's family was inconsistent with their obligation to conduct a thorough sentencing-phase investigation") (citations omitted); Anderson v. Johnson, 338 F.3d 382, 392 (5th Cir.2003) (granting habeas relief and holding that, due to "the fact that there were only two adult eyewitnesses to the crime, it is evident that 'a reasonable lawyer would have made some effort to investigate the eyewitnesses' testimony' "), quoting Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir.1994).

In Bryant v. Scott, the defense attorney failed to interview two eyewitnesses and "restricted his pretrial investigation to discussions with [the defendant], review of the indictment against [the defendant], and examination of the prosecutor's file." Id. The United States Court of Appeals, Fifth Circuit, concluded that "information relevant to [the] defense might have been

obtained through better pretrial investigation of the eyewitnesses, and a reasonable lawyer would have made some effort to investigate the eyewitnesses' testimony." Id.

The Bryant court also rejected the argument that a failure to interview a witness was excusable as a strategic decision if the witness was not credible. The court acknowledged that a lack of credibility may support a strategic decision not to call a witness to testify at trial and explained that a witness's character flaws could not support a failure to investigate. Without so much as contacting a witness, much less speaking to him or her, counsel is "ill-equipped to assess his credibility or persuasiveness as a witness." Id.; see also Wiggins, 123 S.Ct. at 2537-38 ("[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.").

The Third Circuit has similarly concluded that the "failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness." United States v. Gray, 878 F.2d 702, 711 (3d Cir.1989). Although they remain mindful that "the range of reasonable professional judgments is wide," courts recognize that "[i]neffectiveness is generally clear in the context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when [he] has not yet obtained the facts on which such a decision could be made." Id. (citing Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052). Strickland simply "does not require ... defer[ence] to decisions that are uninformed by an adequate investigation into the controlling facts and law." United States v. Drones, 218 F.3d 496, 500 (5th Cir.2000). In Gray, supra, the defense attorney failed to secure the trial testimony of two potential eyewitnesses and, apparently, failed even to interview the

witnesses. Strategic justification cannot be extended to the failure to investigate. United States v. Gray, 878 F.2d 702 (3rd Cir.1989).

Although there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "[j]udicial scrutiny of counsel's performance must be highly deferential," Strickland. at 689, 104 S.Ct. 2052, defense counsel must, "at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client," Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994) (emphasis in original); see also Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir.2002). "[T]he Supreme Court certainly did not intend the Strickland analysis to be a total barrier to relief." Sullivan v. Fairman, 819 F.2d 1382, 1391, (7th Cir. 1987).

A defense attorney's failure to consider alternate defenses constitutes deficient performance when the attorney "neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so." Sanders, 21 F.3d at 1456; see also Phillips v. Woodford, 267 F.3d 966, 980 (9th Cir.2001). Thus, counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052.

Many federal courts of appeals are in agreement that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. See, e.g., Sullivan, 819 F.2d at 1391–92 (perfunctory attempts to contact witnesses not reasonable); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir.1986) (counsel's performance fell below competency standard where he interviewed only one witness); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir.1985) ("[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."); Crisp v.

Duckworth, 743 F.2d 580, 583 (7th Cir.1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) ("Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation."); Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir.1984) (investigation consisting solely of reviewing prosecutor's file "fell short of what a reasonably competent attorney would have done"); see also United States v. Debango, 780 F.2d 81, 85 (D.C.Cir.1986) (suggesting that ineffectiveness shown by complete failure to investigate but finding no prejudice in case before it).

Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made. See Strickland, 466 U.S. at 690–91, 104 S.Ct. at 2065–67; see also Debango, 780 F.2d at 85 ("The complete failure to investigate potentially corroborating witnesses ... can hardly be considered a tactical decision"); Sullivan, 819 F.2d at 1389; Nealy, 764 F.2d at 1178; Crisp, 743 F.2d at 584.

In Stanley v. Bartley, 465 F.3d 810 (7th Cir.2006), defense counsel had not interviewed any prospective witnesses before trial. His "trial strategy ... was to listen to the witnesses' direct testimony and cross-examine them regarding any discrepancies between that testimony and their pretrial statements that were harmful to his client." Id. at 812. The lawyer had "prepared for the trial by reading the statements that prospective witnesses had given the police" but "did not interview any of them." Id. Had he done so, it would have "enabled a damaging cross-examination" of a witness who himself "may have been the murderer" and allowed counsel to impeach as unreliable another witness who testified that the defendant had confessed to her. Id.

The Seventh Circuit Court of Appeals said that the failure to interview witnesses "was a shocking dereliction of professional duty." Id. at 813.

In Texas, "[i]t is fundamental that an attorney must have a firm command of the facts of the case as well as the law before he can render reasonably effective assistance of counsel. [citations omitted] A natural consequence of this notion is that counsel also has a responsibility to seek out and interview potential witnesses and failure to do so is to be ineffective, if not incompetent, where the result is that any viable defense available to the accused is not advanced." Ex parte Lilly, 656 S.W.2d 490 (Tex.Cr.App.1983). Among counsel's duties is that of making an independent investigation of the facts of his client's case. Ex parte Ewing, 570 S.W.2d 941, 947 (Tex.Cr.App.1978). see also Butler v. State, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986).

In Mississippi, "[i]t takes no deep legal analysis to conclude that an attorney who never seeks out or interviews important witnesses and who fails to request vital information was not engaging in trial strategy." Davis v. State, 87 So.3d 465, 469 (¶ 21) (Miss.2012). "Basic defense ... required complete investigation to ascertain every material fact about this case, favorable and unfavorable.... It required ... interviewing every possible eyewitness, and getting statements from each." Triplett v. State, 666 So.2d 1356, 1361 (Miss.1995). The Mississippi Supreme Court has further held: "It is true that this Court should give deference to an attorney's judgment in what investigation should be conducted. However, there are limits. At a minimum, counsel has a duty to interview potential witnesses and to make [an] independent investigation of the facts and circumstances of the case." Payton v. State, 708 So.2d 559, 561 (¶ 8) (Miss.1998) (citation and internal quotations omitted). In Hibbler v. State, 115 So. 3d 832,

839–40 (Miss. Ct. App. 2012), counsel provided deficient performance by failing to interview any witnesses other than the defendant.

The Supreme Court of Washington recently held that trial counsel was deficient for failing to interview witnesses identified in police reports. State v. Jones, 183 Wash. 2d 327, 339, 352 P.3d 776, 782 (2015); see also Rios v. Rocha, 299 F.3d 796, 808, 812 (9th Cir.2002) (defense counsel's "failure, in a first-degree murder trial, to interview more than one witness, when there were dozens of potential eyewitnesses available, before deciding to abandon a potentially meritorious defense constituted constitutionally deficient performance"; defense counsel's decision to present "unconsciousness" defense as opposed to a misidentification was prejudicial because counsel failed to interview and call five eyewitnesses to testify who would have each stated that Rios was not the shooter).

The law in Louisiana is that counsel is ineffective when he or she fails to interview known witnesses. State v. Butler, 41,985 (La.App.2d Cir.6/20/07), 960 So.2d 1208, writ denied, 2007–1678 (La.5/9/08), 980 So.2d 685; State v. Moore, 48,769 (La.App.2d Cir.2/26/14), 134 So.3d 1265, writ denied, 2014–0559 (La.10/24/14), 151 So.3d 598. Additionally, a counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. State v. Johnson, 582 So.2d 885 (La.App. 4th Cir.1991).

In State v. Potter, 612 So.2d 953 (La.App. 4th Cir.1993), writ denied, 619 So.2d 574 (La.1993), the defendant was found guilty of second degree murder. Subsequently, the trial court reversed his conviction, finding that the defendant was denied effective assistance of counsel. More specifically, the trial court found, *inter alia,* that counsel failed to investigate, interview

and subpoena witnesses and failed to obtain exculpatory documentary evidence. The court of appeal affirmed, stating:

> This witness's proposed testimony corroborates the defendant's theory of self-defense in that it documents the most serious incident during which the victim harassed and threatened the defendant. * * * It is difficult to determine what effect this testimony might have had on the jury, but it is not unreasonable to conclude, as did the trial court, that this testimony would probably affect the outcome of the trial.

Id. at 958.

The United States Supreme Court has said that "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In Strickland itself, the Supreme Court made clear that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. 2052. A "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances," which depend on the information the attorney had at his disposal. Id. "For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." Id. In this case, however, plea counsel did not have all the information needed to represent Petitioner effectively.

Ordinarily, courts considering a claim of ineffective assistance should not second-guess strategic decisions of counsel. Strickland, 466 U.S. at 689–90, 104 S.Ct. at 2065–66, 80 L.Ed.2d at 694–95. In particular, a "decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. Giving plea counsel's decision not to carry his investigation of possible eyewitness testimony past a review of the police report and

Little's statement, Petitioner contends that his performance in this respect was sufficiently deficient to satisfy the first prong part of the Strickland test. Neglect and failure to interview available eyewitnesses to a crime cannot be ascribed to trial strategy and tactics. See Hoots v. Allsbrook, 785 F.2d 1214, 1219–20 (4th Cir. 1986).

At the heart of every criminal trial are witnesses. The information they possess can be the difference between conviction and acquittal. Major MacDonnell, It Is Not Just What You Ask, but How You Ask It: The Art of Building Rapport During Witness Interviews, Army Law., AUGUST 1999, at 65, 67.

Kory Little was not a victim in this case or a co-defendant represented by counsel. Plea counsel simply abandoned his obligation to conduct a full investigation. He incorrectly concluded that the presence of a statement to law enforcement obviated his duties to his client. Defense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses. In addition to the information that could have been obtained about the shooting and the resulting coercion, plea counsel could have discovered additional information that would have benefitted Petitioner. Plea counsel breached his obligations to his client when he failed to even send an investigator to speak with Little.

Counsel offered no strategic justification for his failure to make any effort to investigate the case beyond speaking with Petitioner and his brother. As he admitted, he did not speak to Little, nor did he attempt to track down Louallen's statement or attempt to interview him. It is reasonable to assume that, had counsel pursued his duty to investigate, some additional information beyond Little's PCR testimony would have been discoverable. Little's statement surely did not contain an exhaustive list of everything that he knew about the situation. Had counsel been adequately preparing for trial by conducting a full investigation, he would have

interviewed witnesses. Instead, counsel made a decision that investigative efforts would be counter-productive. At the important stage of representation, deciding whether to go to trial or pursue a plea, counsel was unprepared. See Williams v. Lemmon, 557 F.3d 534, 541 (7th Cir.2009) ("[In Stanley v. Bartley, 465 F.3d 810 (7th Cir.2006),] Stanley's lawyer did not prepare for trial; he just showed up and winged it. That's ineffective assistance, when information in counsel's possession suggested that some potential witnesses had exculpatory information.").

A reasonably diligent attorney would have understood the necessity behind interviewing eyewitnesses even if they had already provided a statement to law enforcement, especially considering the critical importance of eyewitness testimony. As demonstrated by the abundance of jurisprudence across the country that holds defense attorneys to the same standards as articulated in Ard v. Catoe, the Sixth Amendment demands more than taking eyewitness statements at face value. Counsel could not have properly prepared for trial without interviewing available witnesses who the state were going to undoubtedly call during its case-in-chief. Instead, counsel undermined the adversarial process by taking at face value the state's theory of the case; the purpose of counsel's representation was unfulfilled when he disregarded his duties to Petitioner.

CONCLUSION

For these additional reasons, Petitioner respectfully requests that this Court reverse the PCR court's denial of relief and remand for a new trial.

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Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2021.