Missouri Court of Appeals

Southern District

Division Two

CODEY L. SMITH,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SD30971
	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	
	)	

APPEAL FROM THE CIRCUIT COURT OF BARTON COUNTY, MISSOURI

Honorable James R. Bickel, Judge

Before Francis, P.J., Bates and Scott, JJ.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

PER CURIAM. The State appeals from a grant of post-conviction relief. In the motion court's words, counsel's tactical decision not to call a particular witness "would be a legitimate trial strategy," because "no matter what [that witness] may have said, it could have backfired" on the defense. In seeming contradiction, however, the court ruled that counsel "could not formulate a reasonable strategy" without contacting the witness. Thus, the court declared counsel ineffective.

"***Strickland***, however, permits counsel to 'make a reasonable decision that makes particular investigations unnecessary.'" ***Harrington v. Richter***, 131 S. Ct. 770, 788 (2011)(quoting ***Strickland v. Washington***, 466 U.S. 668, 691 (1984)). For this and other reasons, the motion court clearly erred and we must reverse the grant of relief.

Ineffective Assistance – Basic Principles

We begin with ***Harrington***, the 2011 Supreme Court case which reiterates that counsel is not ineffective per ***Strickland*** unless representation fell "'below an objective standard of reasonableness.'" The "'strong presumption'" is that counsel acted within the "'wide range'" of reasonable professional assistance. The question is whether the attorney made errors so serious that he did not function as counsel guaranteed by the Sixth Amendment. ***Harrington***, 131 S. Ct. at 787 (quoting ***Strickland***, 466 U.S. at 688, 689).

Overcoming ***Strickland***'s high bar is never easy. ***Id***. at 788. Reviewing courts must apply ***Strickland*** "with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity" of the adversary process, and be "most deferential" in judging counsel's representation, because it is "'all too tempting' to 'second-guess counsel's assistance'" after a conviction. ***Id***. (quoting ***Strickland***, 466 U.S. at 689-90).

There are "'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" ***Id***. at 788-89 (quoting ***Strickland***, 466 U.S. at 689). "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions'

will be limited to any one technique or approach." ***Id***. at 789 (quoting ***Strickland***, 466 U.S. at 689).

The issue is whether counsel's representation "amounted to incompetence" under prevailing professional norms, "not whether it deviated from best practices or most common custom." ***Id***. at 788 (quoting ***Strickland***, 466 U.S. at 690). ***Strickland*** does not guarantee perfect representation, only a reasonably competent attorney. ***Id***. at 791.

Bearing these admonitions in mind, we consider in turn the criminal case, the PCR hearing, and the motion court's challenged ruling.

The Criminal Case

In August 2006, two armed men covered their faces, robbed a Fisca gas station of some $700, and fled in a red "dually" truck. Police matched the license number to a recently-stolen truck, but could not develop other leads.

Israel Freeland, who was in jail awaiting trial on various charges, told police that Codey Smith (Movant) confided to him that Kyle Carroll and Movant stole a Grotheer Farms truck, robbed a gas station of six or seven hundred dollars, then submerged the truck in a Kansas strip pit. Freeland's information checked out. Divers searched the strip pit, found the truck used by the robbers, and helped recover it.

Movant was arrested, charged, tried, and found guilty. Freeland, who testified under a plea bargain, was the State's key witness. Movant's trial counsel was William Fleischaker, an experienced criminal defense attorney and former prosecutor. Movant's sole complaint about Fleischaker, when specifically asked at

sentencing, involved a change of venue. Movant expressed satisfaction, otherwise, with Fleischaker's services.

The PCR Hearing

Movant later sought Rule 29.15 relief, citing in part Fleischaker's alleged ineffectiveness in various respects. One claim criticized Fleischaker for not calling Carroll to testify that Movant was not his accomplice, a tactical decision that Movant claimed "was not good trial strategy."

The motion court held an evidentiary hearing. We summarize the relevant testimony:

> *Movant* – He told Fleischaker about Carroll's possible testimony and asked Fleischaker "to investigate the possibility of Mr. Carroll testifying."
>
> *Carroll* – He pleaded guilty to the Fisca robbery and was serving 10 years. He was not contacted about testifying at Movant's trial. Had he testified, he would have refused to name his accomplice, except to say it was not Movant.
>
> *Fleischaker* – He knew Carroll pleaded guilty to the robbery and refused to name his accomplice. He also knew of Carroll's letter to the prosecutor seeking a sentence reduction "if I help get another conviction" on the robbery.[1] Fleischaker made a strategic decision not to call Carroll as a witness.

[1] Carroll's letter to the prosecutor stated, in part:

> I was woundering [sic] if I could get a sentence reduction, if I help get another conviction on the fisca robbery. I was charged with it back in Sept 17, 07 and got 10 years for robbery .... I done a very wrong thing, but nobody can take the blam [sic] for what I done, but I don't think that I should take all the blam [sic]."

In closing, Carroll asked the prosecutor to send someone to talk with him "an [sic] maybe we can work out a deal."

At the PCR hearing, Fleischaker described his trial strategy generally:

> [T]he whole defense was based on Freeland having been bought and sold. And I mean, we were able to establish that [Deputy] Miller had arranged to get him a pretty sweetheart deal where I think something like seven or eight charges had been dismissed, including I think some sexual offenses against Freeland in exchange, it wasn't, I say, I don't know if there was precisely a quid pro quo, but in exchange for his willingness to testify in this case.
>
> And I guess my feeling was that if the jury, you know, if the jury accepted [Freeland] as being truthful beyond a reasonable doubt with all of the other stuff and [Deputy] Miller testified that she didn't coach him, the rest of the evidence wasn't going to do much good to, you know, sometimes you run a risk of it throwing too much in front of a jury. I thought we had pretty good, pretty good material on Freeland any way.
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> * * *
>
> Well, I mean my basic trial strategy was to rely on the fact that Israel Freeland was lying and to try to get, try to get in closing argument to get the idea across to the jury that, you know, if Israel Freeland was a defense witness, they wouldn't have given an ounce of credibility to his testimony. So, why, because the State put him on with all of this information would they possibly believe him beyond a reasonable doubt[?]
>
> I suggested to the jury that he was lying about being coached. I thought that that was about as clean an approach that we could take. My theory in trying cases is that you can get too many side issues in there and really take the jury's focus away from the primary point and, and that was it. And I, frankly, I thought you know, the jury would have difficulty believing someone beyond a reasonable doubt whose testimony, basically, had been bought and paid for.

On cross-examination, Fleischaker clarified that Freeman was not "bought" financially, but "my belief then and my belief today remains the fact that [Freeman]

got on the witness stand and incriminated Codey because of the deals that were offered to him in exchange for his testimony."[2]

Fleischaker also testified why he chose not to call Carroll as a witness:

> Well, here is the problem with Kyle Carroll: Kyle Carroll had written a letter to you [Prosecutor Steve Kaderly] offering to assist in the prosecution of Codey. I don't know what, to me it was, it was, when you get a situation like that, I didn't know what he was going to say. If I took his deposition and he incriminated Codey, then all I've done is put on evidence that makes my client look more guilty to the jury.
>
> So, I didn't I didn't attempt to call Carroll because, basically, I viewed him as kind of a time bomb either way. If he, if he, if he said that he wasn't, Codey wasn't the person with him, then you were going to impeach him and make him look like a liar, you know, using his, using his letter offering to assist you with the prosecution.
>
> So, I mean my feeling was, he was basically, he was just a time bomb. And if I put him on, regardless of what he said, if he -- obviously, if he talked backwards and said, yes, Codey was the person and I put him on the stand, I was going to have difficulty impeaching him as my own witness. And if he took the stand and said, and I called him and he said, no, Codey wasn't the person with him, then you were going to have the letter to impeach him with. And either way, I thought calling him was going to be damaging, could do nothing, couldn't help my case and had a whole lot of potential to damage it.

Fleischaker further explained why he did not contact Carroll:

> [B]ecause whatever he said was, I felt was just too risky to put him on the stand. The problem is, I could take a tape recorded statement from him or whatever and have it in my possession. I didn't want to have him deposed because, if I depose him and he says that Israel [sic] was the one there, then I have preserved that record permanently.
>
> * * *

[2] Fleischaker's instincts may have been correct. Freeland recanted at the PCR hearing. No one knows, unfortunately, which time(s) Freeland lied under oath.

Q. You did not inquire of Mr. Carroll as to what his proposed testimony would be?

A. No, because it really didn't, like I said, whatever it was he was going to say, I couldn't, I didn't feel comfortable -- I mean, if he offered to come tell me that Codey was going, that Codey wasn't the guy and he would name the other guy, I still felt that under those circumstances, you know, unless I could pin him down under oath, prior to trial, I didn't want to take the risk of putting him on the stand.

* * *

Q. And if [Carroll had said privately], Codey wasn't with me, whether or not he said who was, but he may have told you that as well, you could have deposed him and got his testimony under oath on the record.

A. Well, but that's the point. I mean, I didn't, I didn't know what he was going to say when I deposed him. I knew whatever he told me in private was meaningless until I got him on the record. And I didn't want to take a chance of putting a witness of that nature on the record in a deposition because if he, pardon my expression, "pisses backwards", I have him under oath incriminating my client. It is just too big of a risk.

Even had Fleischaker been convinced that Carroll would testify just as he did at the PCR hearing, Fleischaker still deemed it too risky to call Carroll at trial:

I mean, if I put [Carroll] on the stand, he gets on this witness stand and says to the jury, well, Codey wasn't the other guy. Well, who was the other guy? Well, I am not going to tell you who the other guy was. I mean, in my opinion, that burns Codey in front of the jury.

The Motion Court's Rulings

The motion court orally ruled, *inter alia*:

I believe the trial counsel strategy in deciding not to call Kyle Carroll would be a legitimate trial strategy. Because he, as he testified, no matter what Mr. Carroll may have said, it could have backfired on the movant. However, I have got to feel that, at least Fleischaker

> should have talked to Kyle Carroll to see what he may or may not have privately told him that he would testify to.[3]

Elaborating in its written judgment,[4] the court stated that:

> [Fleischaker] failed to investigate the prospective testimony of Kyle Carroll and merely speculated as to what that testimony might be. He could not formulate a reasonable strategy without first investigating Mr. Carroll as a possible witness at trial. This failure prejudiced Movant because had Mr. Carroll testified at trial, there is a reasonable probability of a different outcome.

Analysis

Fleischaker, an experienced defense lawyer who deemed it too risky to call Carroll, no matter what he might say privately or at trial, opted for a "reasonable doubt" strategy focused on discrediting Freeland, the snitch and only witness linking Movant to the crime. The motion court failed to accord this tactical decision and trial strategy appropriate ***Strickland*** deference.

Counsel's decision to not use a witness is a virtually unchallengeable matter of trial strategy. ***State v. Arndt***, 881 S.W.2d 634, 637 (Mo.App. 1994).

> In many instances seasoned trial counsel do not call particular witnesses for strategic reasons. The witness may hurt rather than help the defense by opening up other avenues of testimony, by refuting defense evidence, by testifying unfavorably on cross

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[3] Continuing, the court admitted that it did not know what Carroll might have said, if anything. Nonetheless, the court opined that "Fleischaker, at that point and time, may not have had to rely only on Kyle Carroll's comments, but he may have been able to develop other evidence." This is speculative, but more importantly, as the State argues and as Movant tacitly concedes, it is beyond the scope of the PCR motion. Movant urges us, however, to consider these "investigation" comments on the issue of calling Carroll as a witness. This we will do; indeed, only in that limited respect could we properly consider such comments.

[4] In which the motion court rejected all of Movant's other claims for relief.

> examination, by being easily impeached, by not making a good witness, etc."

Helmig v. State, 42 S.W.3d 658, 676 (Mo.App. 2001). Indeed, the motion court here acknowledged the risk of taking Carroll's deposition and deemed it "legitimate trial strategy" not to call him at trial.

This leaves only the motion court's view that Fleischaker (and arguably any attorney by extension) could not form a reasonable defense strategy without interviewing a particular witness. Yet ***Strickland***, 466 U.S. at 691, acknowledges that counsel can "make a reasonable decision that makes particular investigations unnecessary." *See also* ***Harrington***, 131 S. Ct. at 788 (quoting ***Strickland***, *supra)*. Citing many ***Strickland*** quotes later repeated in ***Harrington***, and reaching a result similar to ours here, the Missouri Supreme Court noted that "rarely" will counsel's failure to interview witnesses justify a finding of ineffective assistance. *See* ***Sanders v. State***, 738 S.W.2d 856, 858 (Mo. banc 1987).[5]

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[5] Cases where counsel was not ineffective in not calling or contacting witnesses based on unconfirmed beliefs that they would not be helpful include ***Sanders***, *supra*; ***Battle v. State***, 745 S.W.2d 730 (Mo.App. 1987); ***Lowery v. State***, 650 S.W.2d 692 (Mo.App.1983); ***McCollum v. State***, 651 S.W.2d 674 (Mo.App. 1983); ***Joiner v. State***, 621 S.W.2d 336 (Mo.App. 1981); ***Sweazea v. State,*** 588 S.W.2d 244 (Mo.App. 1979).

Similarly, Carroll was not contacted due to Fleischaker's unconfirmed opinion that Carroll could implicate Movant at worst, and at best was subject to strong impeachment that could undermine, by comparison, Fleischaker's attack on Freeland as a "bought and sold" snitch. These concerns – incapable of testing without Carroll taking the witness stand, at which time it would be too late to change tactics – were reasonable under the circumstances, within prevailing professional norms, and should have been accorded great deference by the motion court.

Summary and Conclusion

Like his ***Harrington*** counterpart, Fleischaker represented his client "with vigor and conducted a skillful cross-examination" of Freeland and other prosecution witnesses. ***Harrington***, 131 S. Ct. at 791. It "is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." ***Id***.

Fleischaker had reasonable strategic concern about calling Carroll, even if Carroll privately promised that he would exonerate Movant:

> I mean, if he offered to come tell me that Codey was going, that Codey wasn't the guy and he would name the other guy, I still felt that under those circumstances, you know, unless I could pin him down under oath, prior to trial, I didn't want to take the risk of putting him on the stand.

Heightening Fleischaker's concern was his knowledge of Carroll's letter to the prosecutor seeking to "work out a deal" for sentence reduction "if I help get another conviction" on the robbery. To further compound this dilemma, as the motion court acknowledged, Fleischaker could not safely depose Carroll in order to secure any private assurances:

> I knew whatever he told me in private was meaningless until I got him on the record. And I didn't want to take a chance of putting a witness of that nature on the record in a deposition because if he, pardon my expression, "pisses backwards", I have him under oath incriminating my client. It is just too big of a risk.

Finally, even ignoring – as Fleischaker could not – every risk that Carroll might incriminate Movant, the defense strategy was to paint Freeland as a lying felon who could not be trusted. If the defense called Carroll, the state could argue the same about him, thus undercutting the entire trial strategy.

For all these reasons, "[e]ven if it had been apparent that [Carroll's] testimony could support [Movant]'s defense, it would be reasonable to conclude that a competent attorney might elect not to use it." ***Harrington***, 131 S. Ct. at 789. "It would have been altogether reasonable to conclude that [Fleischaker's] concern justified the course" that he pursued. ***Id***. at 790. Sometimes "the best strategy" – or at least a reasonable one, which is all that ***Strickland*** requires – "can be to say that there is too much doubt about the State's theory for a jury to convict." ***Id***. at 791. "To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option." ***Id***. at 790.

The motion court clearly erred in declaring Fleischaker ineffective for not calling Carroll as a witness. We reverse the motion court's findings and conclusions on this claim, affirm the judgment in all other respects, and remand with instructions to enter a judgment denying all relief.

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