IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1122

Filed: 5 July 2016

Wayne County, No. 11 CRS 52676

STATE OF NORTH CAROLINA

v.

ARRAQIB AHAD HARDY

Appeal by defendant from judgment entered 1 May 2013 by Judge John E. Nobles, Jr., in Wayne County Superior Court. Heard in the Court of Appeals 26 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

BRYANT, Judge.

Where defense counsel's cross-examination of the victim—and the State's only eyewitness—resulted in evidence that the victim had signed an affidavit stating he would drop the charges against defendant and that the victim had engaged in a discussion to exchange money for his silence, defense counsel was operating with the latitude afforded counsel in matters of trial strategy. Accordingly, defendant's argument contending ineffective assistance of counsel is overruled.

On 3 December 2012, defendant Arraqib Ahad Hardy was indicted under Wayne County Superior Court case file number 11 CRS 52676 on three counts of discharging a firearm into occupied property.[1] The matter came before a jury in Wayne County Superior Court on 30 April 2013.

The evidence presented tended to show that on the morning of 26 May 2011, Antwan Stackhouse, a resident of Goldsboro, left his residence on Franklin Street and drove toward his aunt's house, passing the Manhattan Mart located in the 500 block of Wayne Avenue. As he drove down Wayne Avenue, Stackhouse observed defendant and two other people "shooting dice" outside of the Manhattan Mart. Stackhouse recognized defendant: the two had gone to school together. When Stackhouse arrived at his aunt's residence, she was not home, and he headed back to his residence. When Stackhouse again passed the Manhattan Mart, he heard gun shots. Defendant was the only person Stackhouse saw with a gun, and defendant was shooting at him. Stackhouse got control of his vehicle and drove back to his residence. There, he called the police.

At 11:20 a.m., Officer Robert Gardner, with the City of Goldsboro Police Department, responded to a report of property damage at a residence on Franklin Street. When he arrived, Stackhouse was standing next to a vehicle that "had several bullet holes in it and a flat tire." Officer Gardner observed a bullet hole in the right

[1] The record also indicates that defendant was charged with additional counts under 11 CRS 52675 that were dismissed.

rear quarter panel and three bullet holes in the vehicle's back bumper. One round had pierced the radiator, and another had entered the back of the car and struck the inside of the front windshield. In a statement Stackhouse made before Officer Gardner, Stackhouse asserted that when he returned from his aunt's residence, he drove down Wayne Avenue; "[he] saw [defendant] walking toward Deveraux Street. [He] saw [defendant] raise a gun and start shooting."

At trial, Stackhouse was called to testify as a witness for the State. On cross-examination, defense counsel presented Stackhouse with a notarized document Stackhouse had signed on 16 August 2011 stating that he was willing to drop the charges against defendant. On re-direct examination, the prosecutor asked Stackhouse why he signed the affidavit. Stackhouse responded, "A change of heart." Upon further examination, Stackhouse testified that he had previously informed the prosecutor that Philip Hardy, defendant's brother, had offered Stackhouse money to sign the affidavit dropping the charges against defendant. But on the stand, Stackhouse declared this was only partially true.

> A. I signed it. I signed the paper. I was not forced to sign the paper. I signed it at [sic] my own free will, hoping that I would benefit from it. I weren't [sic] forced.
>
> . . .
>
> Q. Did [defendant's] family offer you money to sign that document?

A. No, I asked them for money.

. . .

Q. Okay. So how much did you get?

A. None.

. . .

Q. Then why did you give [the affidavit] to them?

A. A change of heart.

. . .

Q. Okay. It doesn't have anything to do about what really happened, does it?

A. (Negative indication).

Q. That man there shot your car, didn't he?

A. Yes.

The State also called Probation Officer Vickie Oman, who was present during a pretrial interview between the prosecutor and Stackhouse. Officer Oman testified that during a discussion about the affidavit, Stackhouse informed the prosecutor that "Mr. Hardy had made contact with him and offered him money if he would go ahead and drop charges against his brother."

Defendant testified in his own defense that he did not shoot at Stackhouse and that he was unaware of any contact between his brother and Stackhouse.

After the close of all the evidence, the jury returned a verdict finding defendant guilty on one count of discharging a firearm into occupied property in motion (a motor vehicle), but was deadlocked as to the two remaining counts. The trial court declared a mistrial as to the two deadlocked counts and entered judgment against defendant in accordance with the jury verdict. Defendant was sentenced to a term of 73 to 97 months.

On 1 October 2014, defendant filed with this Court a petition for writ of certiorari to review the judgment entered. The petition was granted by order entered 20 October 2014.

On appeal, defendant's sole argument is that his trial counsel rendered ineffective assistance of counsel by introducing the affidavit Stackhouse signed stating that he was dropping the charges against defendant. Defendant contends that by proffering evidence of Stackhouse's statement that he would drop the charges, the State was allowed to introduce otherwise inadmissible evidence regarding Philip Hardy's offer to pay Stackhouse to drop the charges, as well as testimony from the probation officer who corroborated Stackhouse's testimony as to that part. For these acts, defendant contends that he was denied his right to effective assistance of counsel as protected by the United States Constitution and the Constitution of North Carolina. We disagree.

"[Ineffective assistance of counsel (IAC)] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). "[S]hould the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247–48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed.2d 763, 773 (1970)).

In *Braswell*, our Supreme Court adopted a two-part test set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984), as a measure of whether a trial counsel's performance was ineffective. *Braswell*, 312 N.C. at 562–63, 324 S.E.2d at 248.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. (Emphasis added).

Id. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693). Further, our Supreme Court "expressly adopt[ed] the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution." *Id.* at 562–63, 324 S.E.2d at 248.

In support of the first prong of the *Strickland* test, "the defendant must show that counsel's performance was deficient." *Id.* at 562, 324 S.E.2d at 248 (citation omitted). In matters of trial strategy, counsel is given wide latitude, "and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001). In *Fletcher*, the defendant was convicted of first-degree murder in the death of an elderly woman who was attacked in her home during the early morning hours, "taking her from room to room while assaulting her in an effort to locate her valuables." *Id.* at 482, 555 S.E.2d at 550–51. During closing arguments at trial, defense counsel made the following statement: "Is it heinous, atrocious, and cruel? You bet. No doubt about that. I guess the real question is, what's [defendant's] involvement in that." *Id.* at 481, 555 S.E.2d at 550. Though the defendant had previously agreed to the concession, on appeal he challenged the admission as

ineffective assistance of counsel. *Id.* Our Supreme Court reasoned that "[g]iven the overwhelming evidence that this murder was especially heinous, atrocious, or cruel, counsel could reasonably have decided upon a strategy of conceding this aggravating circumstance to gain credibility with the jury—credibility that may have later helped defendant with respect to mitigating circumstances." *Id.* at 482, 555 S.E.2d at 551. Thus, the Court held that counsel's performance was within the latitude afforded in matters of strategy. "[The] [d]efendant's argument that this tactical decision actually hurt [the] defendant's credibility . . . does not persuade us that his counsel's representation fell below an objective standard of reasonableness." *Id.* (citation and quotation marks omitted).

Here, in support of the first prong of the *Strickland* test, that "the defendant must show . . . counsel's performance was deficient," defendant directs our attention to defense counsel's introduction of Stackhouse's affidavit. Defendant argues that the introduction of the "drop charges" form on cross-examination allowed the prosecutor, on re-direct examination, to admit evidence that defendant's brother had offered money to Stackhouse to drop the charges against defendant. As stated in his brief to this Court,

> if the defense counsel had interviewed Stackhouse prior to trial[,] he would have known this testimony would come out on redirect. If defense counsel had not interviewed Stackhouse, it is indefensible to have asked Stackhouse about the 'drop charges' form not knowing the circumstances of the signing of the document.

However, defense counsel's cross-examination of Stackhouse—the victim and the State's only eyewitness to defendant's conduct—on whether he signed an affidavit stating that he would drop the charges against defendant, could be considered a necessary challenge to Stackhouse's credibility; whether Stackhouse admitted or denied signing the affidavit was an important point to establish. And, questioning Stackhouse about his discussing exchanging money for his silence would be a strong strategic attack on his personal integrity and credibility. As such, the decision to cross-examine Stackhouse on whether he signed the "drop charges" affidavit was well within the latitude counsel is afforded on matters of trial strategy. *See id.* Therefore, defendant has failed to satisfy the first prong of the *Strickland* test. Accordingly, defendant's challenge to the proceedings of the lower court on the basis that he did not receive the constitutionally protected right to the benefit of counsel is overruled.

NO ERROR.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).