

NO. 19-5592

IN THE SUPREME COURT OF THE UNITED STATES

DAWUD SPAULDING

Petitioner

-vs-

THE STATE OF OHIO

Respondent

**On Petition for Writ of Certiorari
to the Supreme Court of Ohio**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should courts presume defense counsel acted strategically, even when the evidence in the record demonstrates a lack of strategy in their actions?
2. Is a capital defendant's right to due process violated when he is allowed little substantive opportunity to satisfy the circular requirements of his state's post-conviction statute?

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OPINION BELOW

The decision of the Supreme Court of Ohio declining jurisdiction is reported at *State v. Spaulding*, 2019-Ohio-1759.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in relevant part that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Dawud Spaulding was convicted of the aggravated murders of Erica Singleton and Ernie Thomas and the attempted murder and felonious assault of Patrick Griffin. Spaulding was also convicted of various other felony and misdemeanor offenses.

Spaulding was sentenced to death for his aggravated murder convictions and an additional thirty-two years in prison for the other crimes. The Ohio Supreme Court affirmed Spaulding's direct appeal on December 15, 2016. *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126. Spaulding filed a petition for writ of certiorari in this Court in 2017, which was denied on June 5, 2017.

On December 23, 2013, Spaulding filed his postconviction petition, which he amended on July 31, 2015. On January 10, 2017, the trial court dismissed the postconviction petition and, on September 12, 2018, the Ninth District Court of Appeals affirmed the trial court's decision. Spaulding filed a Memorandum in Support of Jurisdiction in the Supreme Court of Ohio, which was denied on May 15, 2019.

The circumstances of these offenses are that Spaulding and Erica Singleton had been in a relationship for approximately ten years, during which they had two children together. Spaulding abused, threatened, and stalked Erica and, when Erica attempted to terminate the relationship, he killed her on December 15, 2011.

In 2010, Erica reported that Spaulding was making threatening telephone calls and sending threatening text messages. Spaulding was convicted of domestic violence and telecommunications harassment.

In February 2011, Erica reported that Spaulding struck her across the face, knocked her to the floor, and fled with her cell phone. Spaulding pleaded guilty to felony domestic violence.

In August 2011, Erica requested a civil protection order against Spaulding and testified at an ex parte hearing before Magistrate Tracy Stoner in the Summit County domestic relations court. Magistrate Stoner testified at trial and recalled Erica's testimony that Spaulding had threatened her with a gun and threatened her mother and sister. Magistrate Stoner found that this testimony was credible evidence to support Erica's request and issued a one-year protection order. But the order was dismissed when Erica did not appear at the final hearing.

In October 2011, Erica called 911 from a hotel to report that someone had slashed or let the air out of her car tires. The responding officer testified that Erica was "terrified" and that she suspected Spaulding. Erica told the officer that Spaulding had been stalking her by using the GPS in her cell phone. While the officer was at the scene, Erica had a phone conversation with a man she identified as Spaulding. The officer heard the man calling Erica names, swearing, and accusing her of sleeping with "that 'N' word."

Erica began a relationship with Ernest Thomas and often spent time at Thomas's home at 1104 Grant Street in Akron. On November 28, 2011, Erica reported that Spaulding broke into her apartment, held "a gun on [her]," and "almost cut [her] neck." Erica told the responding officers that Spaulding entered the apartment around 5:00 a.m. and stayed several hours, refusing to let her leave. Spaulding straddled Erica in her bed, held a hand over her mouth, brandished a steak knife and a handgun, and threatened "to kill her as revenge for having him arrested in the past." Spaulding also

demanded money. While officers were still at the scene, Erica called Spaulding and, over speakerphone, law enforcement heard Spaulding tell Erica to “let this go” and warned her: “I’m watching you now.”

A warrant was issued for Spaulding’s arrest for aggravated robbery, aggravated burglary, domestic violence, and kidnapping. Erica began staying at a battered-women’s shelter and again sought a civil protection order against Spaulding. On December 1, 2011, Erica appeared at an ex parte hearing in Summit County before domestic relations magistrate Stephan Bennett Collins, who testified at trial that Erica “gave some pretty compelling testimony as to the nature of the violence she had experienced.” Magistrate Collins issued a one-year protection order and scheduled a final hearing for December 14, at which time Spaulding would have an opportunity to respond to Erica’s allegations. Erica did not appear for the final hearing on the civil protection order issued by Magistrate Collins.

On December 14, 2011, Erica asked her mother to watch her children while she went to the movies with Thomas and then to his house at 1104 Grant Street. They spent an hour or two with Thomas's nephew, Patrick Griffin, and his friend, Anthony Shellman. Shortly before 2:00 a.m., on December 15, 2011, Griffin left Thomas's home to pick up food and to sell cocaine. As Griffin was walking out the side door of the house, which opened onto the driveway, he saw someone with a gun. Griffin was shot in the back of the neck, and the bullet transected his spinal cord, paralyzing him from the neck down. Shellman heard Griffin say, “Ah, shit,” followed by three gunshots and the sound of Griffin’s screams. Shellman ran back into the house and used a mattress for cover. He heard someone unload a gun and exchange the clip. Shellman saw “a tall

individual,” whom he could not identify. Eventually, Shellman ran out of the house with Thomas and Erica and called 911.

Emergency medical personnel transported Griffin to the hospital. His car remained at 1104 Grant Street, where it blocked Thomas's and Erica's cars in the driveway until it was towed at 5:00 a.m. According to Thomas's friend, Niechelle Bell, she gave Thomas and Erica a ride to Erica's apartment in Tallmadge at 3:30 or 4:00 a.m.

Sometime later, Erica and Thomas returned to 1104 Grant Street to pack their bags and retrieve their cars. Around 7:45 a.m., Erica called her mother, Kimberly (“Kim”) Singleton, and said she was on her way to pick up one of the children from school. Not long after, Spaulding called Kim and asked, “Did Erica make it there yet?” When Kim told Spaulding that Erica was on her way, Spaulding “started laughing” and asked, “She ain't made it there yet?”

At 8:01 a.m., Erica and Thomas were found lying in the driveway of 1104 Grant Street and a call was made to 911. Erica was found lying face-down, holding a piece of luggage and a purse. Thomas was lying a few feet away. Thomas's car was running with the driver's side door open. A bag of clothes and a piece of luggage were in the backseat, and another piece of luggage was next to the car. Erica and Thomas died from gunshot wounds to the back of their heads.

Kim arrived while police were processing the scene and told the officers that she believed that Spaulding had killed her daughter. She also said that approximately a week before her death, Erica had shown her life insurance policies and explained, “[J]ust in case something happen [s], * * * I got a hundred thousand dollars on me.” Kim further testified that she had urged her daughter to leave Spaulding at various

times but that Erica kept “going back” to him. A social worker at a battered-women's shelter testified about the dynamics of domestic violence and explained that victims are often reluctant to prosecute domestic violence, have a tendency to return to abusive relationships, and tend to blame themselves for the violence.

Spaulding's cell-phone records revealed that his cell phone was in the vicinity of 1104 Grant Street at the time of both of the shooting incidents. Patrick Griffin identified Spaulding as his shooter in the hospital and during a deposition in September 2012 via closed-circuit video.

ARGUMENT

The crux of Spaulding's argument is that both the trial court and the appellate court erred in determining that his trial attorneys were effective based on his assertion that counsels' decisions did not fall within the purview of trial strategy. The State disagrees. The findings of the trial court and the appellate court are supported by the evidence presented in this case. Spaulding simply disagrees with the courts' findings.

In order to establish a Sixth Amendment violation, a defendant ordinarily must establish both that counsel performed deficiently and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, Spaulding has not established that his attorneys were deficient or that he was prejudiced by their performance.

At the outset, the State respectfully submits that Spaulding's question regarding whether courts should “presume” that defense counsel acted strategically is based on his faulty premise that the state courts in this case simply “presumed” that his trial counsel were acting strategically. However, to the contrary, the decision of the trial court and the decision of the appellate court in this case, affirming the trial court's denial of

Spaulding's petition for postconviction relief demonstrates that the appellate court's determination that trial counsels' actions fell within the purview of trial strategy was based on evidence rather than simply a presumption. For example, the appellate court noted that the "two shooters/masked men" theory was presented at trial. Thus, Spaulding's contention that the state courts deferred to "nonexistent strategy decisions" is false and not supported by the record in this case. Instead, the record contains evidence of the "two shooters/masked men" theory argument. At trial, Spaulding's attorneys used information collected by their investigator to present this theory and cross-examined Lieutenant Phister, who stated that two black men were seen leaving the scene, who appeared to end up at Tarson Terrace and that a bag was thrown from Tarson Terrace that was never found. [Tr. 2170]. The jury was also presented with this theory when the jurors viewed Spaulding's interviews with police and heard him state that he heard masked men had come into the home. Additionally, Spaulding's attorneys presented the "two shooters/masked men" theory when they challenged the credibility and identifications made by both Todd Wilbur and Patrick Griffin. Thus, contrary to Spaulding's assertions, the record contains evidence of counsels' strategy and their introduction of the "two shooter/masked men" defense theory. Furthermore, it is important to note that counsels' decision to not present specific witnesses with regard to this theory makes sense since this theory directly contradicts the testimony of one eyewitness who saw just one man approach Ernie Thomas and Erica Singleton, not two.

Moreover, in his petition, after asserting that the state courts deferred to nonexistent strategies, Spaulding acknowledges that his trial attorneys did in fact present evidence regarding the "two shooters/masked men" theory at trial, but goes on to say that the theory could have been "galvanized." Simply because the theory wasn't

presented in the manner that Spaulding's current counsel would have presented it to the jury does not equate to error on the part of either the trial court or the appellate court in finding that Spaulding's trial attorneys acted strategically.

Spaulding further contends that the trial court's finding that counsel acted strategically was based on a presumption and not evidence based on his assertion that trial counsel did not investigate other theories, including that the shootings could have been related to other shootings in the area. This contention is not correct. The record shows that evidence was presented to the jury that other shootings had occurred in the neighborhood. [Tr. 1524; 1528; 1546; 1799; 1800]. In addition, the jury was presented with evidence regarding the investigation of Ernest Thomas as a suspect and the reasons for which charges were dropped against him. [Tr. 1429-1432; 2104; 2176; 2178; 1427]. Counsel is not ineffective for declining to pursue theories that are determined to be fruitless or are inconsistent with the evidence.

In asking this Court to grant the writ, Spaulding argues that his trial attorneys failed to investigate the case and, as such, their decisions cannot be considered strategic. This assertion is also not supported by the evidence. Instead, the record shows that Spaulding's investigator interviewed individuals prior to trial and, in Spaulding's petition for postconviction relief, he acknowledged that information from witnesses was given to his defense team and that Attorney Walker was present for the interview with William Scarbrough, who was an inmate. Thus, despite Spaulding's assertions to the contrary, the evidence in this case demonstrates that his trial attorneys were acting strategically and did in fact investigate the matter.

Spaulding also argues that trial counsel's failure to call an expert to testify about Patrick Griffin's cognitive functions and his ability to access memories at the time that

the police took his statement cannot be characterized as strategic. Thus Spaulding argues that the trial court should not have concluded that it was a matter of trial strategy and, to have reached that conclusion, the courts must have relied on presumption rather than evidence. This is not supported by the record.

Instead, a review of the case shows that both the trial and appellate courts concluded that the report of Dr. Bergese, which was an exhibit to the petition for postconviction relief, did not significantly advance a claim of ineffective assistance of counsel. The appellate court further concluded that any speculation that a tactic might have improved Spaulding's defense does not demonstrate ineffective assistance of counsel. Furthermore, Spaulding's attorneys extensively cross-examined Nurse Trankelback regarding Patrick Griffin's medical records, which were entered into evidence as exhibits at trial, in an attempt to impeach his identification. The scope of cross-examination is widely recognized as trial strategy.

Spaulding cannot show prejudice by counsel's failure to call an expert regarding sedation and its potential impact on Griffin's ability to access memory at the time the police initially spoke to him because Griffin testified at trial that Spaulding was the shooter. Therefore, it is illogical to conclude that the trial court erred in determining that the strategic decisions of trial counsel were based on presumptions made by the court rather than the evidence presented. As such, Spaulding's basis for this court to grant the writ is based on a faulty premise.

Finally, Spaulding contends that Ohio's postconviction procedure does not comport with due process. Spaulding failed to challenge the constitutionality of Ohio's Postconviction Statute, Ohio Rev. Code § 2953.21, in the trial court and failed to raise a

plain error argument with regard to the same in his appeal of the denial of his petition for postconviction relief. Consequently, Spaulding has forfeited this argument.

In light of the foregoing, the State requests that the Court deny Spaulding's request for the Court to review the case.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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