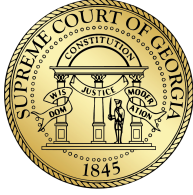


APPENDIX A

Order Denying Certificate of Probable Cause to Appeal
Denial of Habeas Corpus

Supreme Court of Georgia
April 29, 2019



SUPREME COURT OF GEORGIA
Case No. S19H0103

Atlanta, April 29, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MARCUS JACKSON v. VANCE LAUGHLIN, WARDEN et al.

From the Superior Court of Wheeler County.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 17-CV-082

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lia C. Fulton, Chief Deputy Clerk

APPENDIX B

Final Order Denying Petition for Writ of Habeas Corpus

Superior Court of Wheeler County, Georgia
July 26, 2018

IN THE SUPERIOR COURT OF WHEELER COUNTY
STATE OF GEORGIA

WHEELER COUNTY, GEORGIA
FILED IN OFFICE

2018 JUL 26 AM 10:05

Candace W. Bragg
CLERK SUPERIOR COURT

MARCUS JACKSON,

Petitioner,
GDC No. 100015912,

v.

VANCE LAUGHLIN, Warden, and
HOMER BRYSON, Commissioner,
Georgia Department of Corrections,

Respondents.

)
)
)
)
) Habeas Action
) File No. 17CV082
)
)
)
)
)
)
)

FINAL ORDER

Petitioner, MARCUS JACKSON, filed this Application for Writ of Habeas Corpus on September 22, 2017 challenging the validity of his April 16, 2009 Fulton County conviction for murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a crime. An evidentiary hearing occurred on April 9, 2018. After reviewing the Petition, the entire record of the case, and applicable law, the Court makes the following findings:

PROCEDURAL HISTORY

Petitioner was indicted by the Fulton County grand jury on November 16, 2007 of murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. (HT 156-158). A jury convicted Petitioner on all counts. (HT 403, 405). Petitioner filed a Motion for New Trial on April 20, 2009 alleging:

1. The verdict is contrary to the evidence, and without evidence to support it;
2. The verdict is decidedly and strongly against the weight of the evidence;
3. The verdict is contrary to the law and principles of justice and equity;

4. Whether or not the State proved the defendant's guilt beyond a reasonable doubt, the evidence was nevertheless sufficiently close so as to warrant the Court to exercise its discretion to grant a new trial; and
5. The Court committed error of law warranting the grant of a new trial.

(HT 413-414). Following the appointment of appellate counsel to his case, Petitioner filed an Amendment to Motion for New Trial on September 1, 2011 to include the following grounds:

1. The trial court erred in denying defendant's motion in arrest of judgment for a new trial, due to the fact the jury found the defendant guilty of mutually exclusive verdicts: murder, felony murder, aggravated assault, involuntary manslaughter, and reckless conduct;
2. Defendant's counsel at trial was ineffective in not seeking a curative instruction after Detective Israel testified that the defendant "never talked;"
3. The trial court erred by denying defendant's motion for a mistrial after Detective Israel testified that the defendant "never talked," a point which the court indicated was "certainly a ground for a new trial;"
4. The trial court erred in denying defendant's motion for a directed verdict; and
5. The trial court erred in admitting state's evidence, marked no. 41, 42, 43, and 44.

(HT 420-421). On September 14, 2012, Petitioner filed his Second Amended Motion for New Trial alleging:

1. The State failed to present sufficient evidence to support the verdict in this case. Jackson v. Virginia, 443 U.S. 307 (1979).

(HT 425). On November 7, 2012, the trial court granted Petitioner's motion for new trial and found that the State failed to present sufficient evidence to support the verdict. (HT 430). The trial court subsequently issued an amended order granting Petitioner's motion for new trial. (HT 431). Petitioner moved for a plea in bar based on former jeopardy to dismiss the charges against

Petitioner. (HT 428-429). The State filed a Notice of Appeal on November 14, 2012. (HT 154-155). Petitioner moved to dismiss the Notice of Appeal but the motion to dismiss was denied. (HT 449-450).

On appeal, the State alleged that the trial court erred when it determined that there was no evidence that Petitioner intentionally helped in the commission of the crimes charged because Petitioner had a dispute with the victim. The Supreme Court of Georgia reversed the trial court's grant of Petitioner's motion for new trial, and Petitioner's convictions were affirmed by the Supreme Court of Georgia on September 23, 2013. State v. Jackson, 294 Ga. 9 (2013).

Following this reversal by the Supreme Court of Georgia, Petitioner filed a motion for reconsideration in which he argued that the trial court's order granting the motion for new trial should be vacated rather than reversed and the case remanded to permit the trial court to review the case under the thirteenth juror standard. State v. Jackson, 295 Ga. 825 (2014). The Georgia Supreme Court denied the motion for reconsideration and issued a remittitur to the trial court filed on November 12, 2013. Id. Petitioner filed a "Motion for Ruling Pursuant to O.C.G.A. § 5-5-20 and 5-5-21." Id. The newly assigned judge to the case entered an order filed on November 20, 2013 adopting the judgment of the Supreme Court of Georgia. Id. Nevertheless, the judge who presided over the trial also entered an order dated December 6, 2013 purporting to grant Petitioner's motion for new trial pursuant to O.C.G.A. § 5-5-20 and § 5-5-21. (HT 35-39).

The State appealed from this second purported grant of new trial and the Supreme Court of Georgia reversed. State v. Jackson, 295 Ga. 825. The Supreme Court held that, post-remittitur, Petitioner could not secure a new trial on grounds that were not preserved in the motion subject of the original appeal. Id. The Supreme Court ruled that the trial court was only authorized to adopt the Supreme Court's judgment and to enter an order denying Petitioner's motion for new trial. Id.

Petitioner filed the instant Application for Writ of Habeas Corpus on September 22, 2017 alleging:

1. Appellate counsel rendered ineffective assistance by failing to timely challenge the verdicts of guilty in Petitioner's case on "thirteenth juror" grounds.

The Court held an evidentiary hearing on April 9, 2018 in which appellate counsel testified and was subject to cross-examination.

GROUND ONE

In Ground One, Petitioner alleges that he received ineffective assistance of appellate counsel when appellate counsel failed to timely challenge the verdicts of guilty in Petitioner's case on "thirteenth juror" grounds. Specifically, appellate counsel waived the thirteenth juror claim in favor of the single claim of insufficiency of the evidence under Virginia.

Petitioner was represented by Alixe Steinmetz during his motion for new trial and appeal. (HT 7). Appellate counsel graduated from Duke University and Vanderbilt Law School. (HT 20). She gained admission to the Georgia Bar in 2007. She worked as a public defender in South Carolina and worked in private criminal defense in Georgia for over year before transitioning into the Atlanta Circuit's public defender office. (HT 20).

In the initial motion for new trial, both insufficiency of the evidence and thirteenth juror claims were raised. However, counsel expressly waived and abandoned all other grounds in favor of the insufficiency of the evidence claim. (HT 8-10). Counsel explained that she was under the impression that a sufficiency of the evidence ruling could not be appealed by the State and would result in a final determination of his case whereas the thirteenth juror determination would have been appealable and not a final determination. (HT 10-11, 20-21). Counsel acknowledged that had she known the insufficiency of the evidence claim could be appealed, she would have maintained the thirteenth juror argument. (HT 15). However, appellate counsel testified that she raised the single issue that she believed had the greatest likelihood of resulting in the reversal of Petitioner's conviction. (HT 21).

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this

deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, Petitioner must show that his appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

The instant case fails on the first prong of the Strickland analysis. Petitioner has failed to show that appellate counsel's performance was deficient. The determination that counsel rendered ineffective assistance requires that appellate counsel's decision not to raise a particular issue was an unreasonable decision which only an incompetent attorney would make. Petitioner alleges that appellate counsel was ineffective in not pursuing the thirteenth juror issue. Appellate counsel testified at the hearing that she raised insufficiency of the evidence as the single issue that she believed had the greatest likelihood of resulting in the reversal of Petitioner's conviction. (HT 21). However, appellate counsel acknowledged that she pursued this ground in the mistaken belief that the State could not appeal the trial court's grant of a new trial on an insufficiency of the evidence basis. (HT 10-11, 20-21). In fact, the State did appeal the decision and the Georgia Supreme Court reversed.

There is a "strong presumption that counsel's conduct falls within the broad range of reasonable professional conduct" and "hindsight has no place in an assessment of the performance of [. . .] counsel and a lawyer second-guessing his own performance with the benefit of hindsight has no significance for an ineffective assistance of counsel claim." Green v. State, 291 Ga. 579 (2012); Simpson v. State, 298 Ga. 314 (2016) (even where counsel rejected characterization of his performance as strategic, examination of his entire testimony shows his decisions were, in fact, strategic). Counsel's subjective assessment or explanation for her conduct is not determinative of the issue of the reasonableness of an attorney's conduct. "If a reasonable lawyer might have done what the actual lawyer did – whether for the same reasons given by the actual lawyer or different reasons entirely – the actual lawyer cannot be said to have performed in an objectively unreasonable way." Shaw v. State, 292 Ga. 871, n. 7 (2013); Hughley v. State, 330 Ga. App. 786 (2015); *see also*, Harrington v. Richter, 562 U.S. 86

(2011)(finding that objective reasonableness determines the effectiveness of counsel rather than counsel's subjective state of mind); Hartsfield v. State, 294 Ga. 883 (2014).

Here, the Georgia Supreme Court has found that it was a reasonable strategy for Petitioner to only move forward on the single ground of insufficiency of the evidence stating that

Jackson's 'thirteenth juror' theory of relief was initially advanced in his motion for new trial, but relief on that claim would only have gained Petitioner a new trial. It is apparent that Jackson made a strategic choice to waive all other grounds for new trial in favor of advancing only an assertion of legal sufficiency of the evidence because, if that gamble was ultimately successful, his conviction would be reversed and he would not be subject to retrial.

Jackson v. State, 295 Ga. 825 (2014). Appellate counsel testified that her strategy in pursuing the sole issue of insufficiency of the evidence was to obtain a final determination of the case. While she was mistaken in her belief that the issue was not directly appealable by the State, counsel affirmed that she strategically chose to advance Petitioner's strongest claim that would not subject Petitioner to retrial. Rather than pursue multiple grounds which, while potentially successful, would have subjected Petitioner to a retrial, appellate counsel chose to advance the sole issue which, if affirmed on appeal, would have been a final determination of the case. While appellate counsel further testified that she should have pursued the thirteenth juror issue, pursuing the sole insufficiency of the evidence issue was not an unreasonable decision that only an incompetent attorney would make.

The decision to go forward with the single sufficiency of the evidence claim was an objectively reasonable strategy. This is true even if the reason appellate counsel gave for her conduct does not match the reasoning given by the Supreme Court's analysis as to why this constituted reasonable strategy. Petitioner has thus failed to show any error of counsel and is unable to prove the first prong of the Strickland test. In the absence of error by counsel, the Court need not consider Strickland's second prong.

Accordingly, this ground provides no basis for relief.

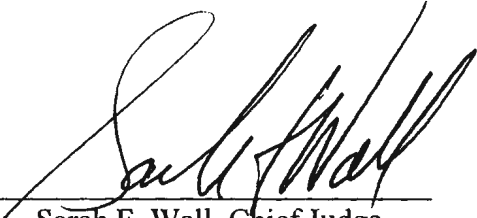
CONCLUSION

WHEREFORE, the instant Petition for Writ of Habeas Corpus **DENIED**.

If Petitioner desires to appeal this Order, Petitioner must file a written application for certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of this Order. Petitioner must also file a Notice of Appeal with the Clerk of the Superior Court of Wheeler County within the same thirty (30) day period.

The Clerk of the Superior Court of Wheeler County is hereby DIRECTED to mail a copy of this Order to Petitioner, Petitioner's Attorney of Record, Respondent, and Special Assistant Attorney General Daniel M. King, Jr.

SO ORDERED, this 20 day of July, 2018.



Sarah F. Wall, Chief Judge
Wheeler County Superior Court