



SUPREME COURT OF GEORGIA

Case No. S20H0537

June 29, 2020

The Honorable Supreme Court met pursuant to
adjournment.

The following order was passed.

SHAUNA SMITH v. BROOKS BENTON, WARDEN.

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. 17CV0575

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.

Theresa N. Barnes, Clerk

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

SHAUNA SMITH,
GDC # 1000446646,

* CIVIL ACTION
* NO. 17CV0575RS

David C. Wall
David Wall, Clerk
Habersham County, Georgia

Petitioner,

v.

BROOKS L. BENTON, WARDEN,

* HABEAS CORPUS

Respondent.

FINAL ORDER

Petitioner Smith filed this habeas corpus petition to challenge the validity of her December 2010 Fulton County jury trial convictions for malice murder, burglary, and possession of a firearm during commission of a felony, which were affirmed on appeal in 2016. Upon consideration of the record as established at an evidentiary hearing held on September 19, 2018,¹ the Court denies relief, based on the following findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

Petitioner was indicted with Gregory Williams by the grand jury of Fulton County on May 19, 2009, for malice murder (count 1), felony murder (count 2), aggravated assault with a deadly weapon (count 3), burglary (count 4) and possession of a firearm during commission of a felony (count 5) in connection

¹ Citations to the September 19, 2018, evidentiary hearing transcript will hereafter be referred to as "HT."

with the death of Brian Mosely. (HT. 11-13). At a joint jury trial with Williams on December 13-20, 2010, Petitioner was found guilty of all counts and sentenced to life imprisonment for count 1, twenty years consecutive imprisonment for count 4, and five years consecutive imprisonment for count 5. (HT. 1517-28).

Petitioner changed counsel post-trial and enumerated one error on direct appeal:

The trial court denied Appellant of her fundamental right to be present at all critical stages of trial under the Georgia Constitution by holding a bench conference at which Appellant was not present, without a valid waiver, in which it was decided to excuse a petit juror without Appellant's consent and then excusing said juror without Appellant's consent.

(HT. 3419).

The Georgia Supreme Court determined this claim lacked merit and affirmed Petitioner's convictions in *Smith v. State*, 300 Ga. 161, 794 S.E.2d 127 (2016).

Petition was Filed November 14, 2017

Petitioner filed this petition on January 25, 2018, challenging these convictions and raising four grounds. On August 7, 2018, Petitioner filed an amended petition replacing her original petition, raising twelve grounds. Petitioner and her former appellate counsel, Jonathon Majeske, testified at the September 2018 hearing. After the close of evidence at the September 2018 hearing, Petitioner's current habeas counsel, Rodney Zell, entered his appearance on

January 16, 2019. In Petitioner's proposed order, submitted on August 26, 2019,

Petitioner moves forward on one ground.

II. PETITIONER'S SOLE GROUND

In Petitioner's sole ground in her proposed order, Petitioner alleges that appellate counsel was ineffective for failing to raise on appeal that her trial counsel was deficient for not moving to suppress the phone records presented as evidence against her. (Petitioner's Proposed Order, p. 4). Petitioner argues that the situation exceeded the scope of the search and that counsel was deficient for failing to raise this issue on appeal. *Id.* at 7-8. Petitioner also argues that any deficiency is not harmless, as the Supreme Court of Georgia placed a great deal of emphasis on the importance of these cell phone records, and that there is a reasonable probability of a different result had this evidence not been admitted at trial. *Id.* at 5-6, 8.

Findings of Fact

Jonathon Majeske was retained on appeal to represent Petitioner. (HT. 12). At the time Majeske represented Petitioner on appeal, he had handled 65-70 felony jury trials and about six appeals. (HT. 12). Majeske prepared for the appeal by reviewing discovery, reviewing the transcripts and evidence, and meeting with Petitioner after reviewing those documents. (HT. 13). He also discussed the case with former trial counsel. (HT. 13).

During cross-examination of Detective Buchanan at trial, trial counsel questioned Detective Buchanan about his pursuit of cell phone records of Petitioner. (HT. 2538). Detective Buchanan admitted to embellishing the fax cover sheet for the request to Sprint and Metro PCS, where he claimed that he had reason to believe that Petitioner and another individual were planning to "leave town." (HT. 2537-40). Majeske did not believe there was a viable claim to raise concerning trial counsel not moving to suppress the cell phone records obtained by Detective Buchanan. (HT. 15). Majeske thought that trial counsel had implemented sound trial strategy by cross-examining and impeaching the Detective about this issue at trial. (HT. 43, 49). Majeske believed that Detective Buchanan's request for the cell phone records was authorized and that any embellishment on the fax sheet did not have any constitutional significance to have justified the filing of a motion to suppress. (HT. 15, 44-45).

Majeske thought that the issue he raised on appeal was the one issue that could have been successful. (HT. 19). Majeske thought it was a very clean trial. (HT. 19).

Conclusions of Law

Strickland v. Washington, 466 U.S. 668, 687 (1984), sets forth a two-pronged test, both of which must be proven by a defendant to prevail on a claim of ineffective assistance.

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 by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreasonable.

As to the first prong, this Court's scrutiny of an attorney's performance must be "highly deferential." *Strickland*, 466 U.S. at 689.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

As to the prejudice prong:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

A reviewing court does not have to decide both prongs of this test in order to resolve an ineffective assistance claim, as the object "is not to grade counsel's performance." *Id.* at 697. If it is easier to dispose of an ineffective assistance

claim on the basis that no prejudice has been shown, “that course should be followed.” *Id.*

The Georgia Supreme Court has adopted *Strickland* for analyzing an appellate attorney’s performance. *Shorter v. Waters*, 275 Ga. 581, 571 S.E.2d 373 (2002). When the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must overcome the “strong presumption” that appellate counsel’s actions fell within the range of reasonable professional conduct and affirmatively show that appellate counsel’s decision not to raise the issue “was an unreasonable one which only an incompetent attorney would have made.” *Griffin v. Terry*, 291 Ga. 326, 337, 729 S.E.2d 334 (2012) (citations omitted). To establish prejudice, a petitioner must show that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.*

Where the claim is that appellate counsel was ineffective for not raising claims of trial counsel ineffectiveness, “two layers of fact and law are involved in the analysis of the habeas court’s decision.” *Gramiak v. Beasley*, 304 Ga. 512, 820 S.E.2d 50 (2018). To find that appellate counsel provided ineffective assistance, a reviewing court must determine that appellate counsel’s performance was deficient in not raising the issue. *Id.* If appellate counsel’s performance is found to be deficient, then the petitioner must establish prejudice, which requires

a showing that, had the trial counsel ineffectiveness claim been raised on appeal, there is a reasonable probability that the outcome of the appeal would have been different. *Id.* "This, in turn, requires a finding that trial counsel provided deficient representation and that the defendant was prejudiced by it." *Id.*

Petitioner has not satisfied either prong of the *Strickland* test. Petitioner has not shown that appellate counsel's performance was deficient nor has she established the requisite prejudice.

Appellate counsel reviewed discovery, the transcripts, and evidence; met with Petitioner after reviewing everything; and discussed the case with former trial counsel. (HT. 13). Appellate counsel was aware of the fax cover sheet by Detective Buchanan to obtain the phone records and reviewed this issue, including trial counsel's cross-examination of Detective Buchanan. (HT. 43, 492537-40). Appellate counsel reasonably determined that trial counsel used good strategy in impeaching Detective Buchanan during cross-examination by questioning Detective Buchanan about the fax cover sheet, admitting exhibits of the fax cover sheet, and having Detective Buchanan admit to embellishing. (HT. 43, 492537-40). Appellate counsel concluded that there was no viable basis to challenge trial counsel's effectiveness, particularly as Detective Buchanan's request was authorized despite any embellishments on the fax cover sheet. (HT. 44-45). Petitioner has not shown that appellate counsel performed deficiently as

to his decision not to raise this issue of trial counsel ineffectiveness on appeal. *See Gramiak v. Beasley*, 304 Ga. 512. Appellate counsel's decision was reasonable, as Petitioner has not shown there was a viable basis for trial counsel to have moved to suppress the cell phone records Detective Buchannan obtained. *See Marchman v. State*, 299 Ga. 534, 538, 787 S.E.2d 734, 740 (2016); *Registe v. State*, 292 Ga. 154, 154, 734 S.E.2d 19, 20 (2012).

Further, Petitioner has not shown that she was prejudiced by appellate counsel's decision not to raise this issue on appeal. Trial counsel had no viable basis to pursue a motion to suppress; thus, Petitioner has not shown trial counsel was ineffective. Phone records are business records owned by the telephone company, not a defendant, and defendants generally lack standing to challenge the release of such records under the Fourth Amendment because they do not have a reasonable expectation of privacy in records belonging to someone else. *Marchman*, 299 Ga. at 538; *Registe*, 292 Ga. at 154. Petitioner argues that police are required to obtain a search warrant when searching a cell phone, citing *Riley v. California*, 573 U.S. 373 (2014). (Petitioner's Proposed Order, p. 6). However, in *Marchman v. State*, the Georgia Supreme Court determined that *Riley* was distinguishable, as it involved the seizure of a cell phone, incident to arrest, as opposed to phone information duly obtained from a third party such as a phone's service provider. *Marchman v. State*, 299 Ga. 534, 538, 787 S.E.2d 734,

740 (2016). Because a motion to suppress admissible evidence would have been without merit, trial counsel's decision not to pursue such a motion did not amount to ineffective assistance of counsel. *See Moore v. State*, 293 Ga. 676, 679, 748 S.E.2d 419, 424 (2013) (failure to raise a meritless motion is not ineffective assistance of counsel). Petitioner has not shown that, had this claim of trial counsel ineffectiveness been raised, there was a reasonable probability that the outcome of the appeal would have been different.

In conclusion, Petitioner has not met her burden under *Strickland* to succeed on her claim of appellate counsel ineffectiveness. Petitioner's sole ground lacks merit.

CONCLUSION

Wherefore, the habeas corpus petition is denied.

If Petitioner desires to appeal this order, she must file an application for a certificate of probable cause to appeal with the Clerk of the Georgia Supreme Court within thirty (30) days of the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Habersham County Superior Court within the same thirty (30) day period.

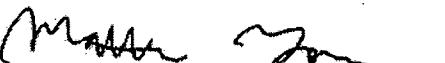
The Clerk of the Superior Court is hereby directed to provide a copy of this order to Counsel for Petitioner, Respondent, and the Attorney General's Office.

SO ORDERED, this 27th day of September, 2019.



RUSSELL W. SMITH, Chief Judge
Mountain Judicial Circuit

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**Cited By (0)**

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Shauna Smith v. Brooks L. Benton, A20A0723 (Ga. Ct. App. 2019)

Court of Appeals of Georgia

Filed: December 4th, 2019

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Citations: None known

Docket Number: A20A0723

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Authorities (2)

This opinion cites:

- [Neal v. State, 722 S.E.2d 765 \(Ga. 2012\) \(/opinion/2504897/neal-v-state/?\)](#) (1 time)
- [Saxton v. COASTAL DIALYSIS AND MEDICAL CLINIC, 476 S.E.2d 587 \(Ga. 1996\) \(/opinion/1205787/saxton-v-coastal-dialysis-and-medical-clinic/?\)](#) (1 time)

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Court of Appeals
of the State of Georgia

ATLANTA, _____
November 26, 2019

The Court of Appeals hereby passes the following order:

A20A0723. SHAUNA SMITH v. BROOKS L. BENTON.

In 2010, Shauna Smith and a co-defendant were convicted of malice murder and other crimes. The Georgia Supreme Court affirmed Smith's convictions in 2011 in [Williams v. State](#),

300 Ga. 161

(794 SE2d 127) (2016). She has now filed in this Court a notice of appeal from the trial court's denial of her petition for a writ of habeas corpus.

Under our Constitution, the Supreme Court has appellate jurisdiction over "[a]ll cases in which a sentence of death was imposed or could be imposed." Ga. Const. of 1983, Art. VI, Sec. VI, Par. III (8). Because a penalty of death may be imposed for the crime of murder, jurisdiction is proper in the Supreme Court. [OCGA § 16-5-1 \(a\), \(e\) \(1\); Neal v. State](#),

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, 178 (476 SE2d 587) (1996) (the Supreme Court has the ultimate responsibility for determining appellate jurisdiction). Additionally, the Supreme Court has exclusive appellate jurisdiction over all cases involving habeas corpus. See Ga. Const. 1983, Art. VI, Par. III (4). Accordingly, this application is hereby TRANSFERRED to the Supreme Court for disposition.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta,

11/26/2019

I certify that the above is a true extract of the minutes of the Court of Appeals of Georgia, witness my signature and the seal of hereto affixed the day and year last above written.

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