SCWC-14-0000737

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

DERRICK SMITH,
Petitioner/Petitioner-Appellant,

vs.

STATE OF HAWAIʻI,
Respondent/Respondent-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-14-0000737; S.P.P. NO. 10-1-0007 (FC-CR NO. 03-1-0277))

DISSENT BY WILSON, J.

I respectfully dissent to the rejection of the Application for Writ of Certiorari seeking review of the Intermediate Court of Appeals' (ICA) June 8, 2015 judgment entered pursuant to its April 30, 2015 Memorandum Opinion. The ICA's judgment affirmed the Circuit Court of the First Circuit's (circuit court) "Findings of Fact, Conclusions of Law, and Order Denying Amended Rule 40 Post-Conviction Relief Petition."

Petitioner/Petitioner-Appellant Derrick Smith was convicted of second degree murder and sentenced to life in prison with the possibility of parole based on the county medical examiner's expert testimony that Smith's eight-week-old son died from non-accidental abusive head trauma. Smith's trial counsel identified, but failed to contact, an expert whose opinion refuted that of the medical examiner, the State's key witness. Accordingly, Smith correctly contends he was deprived of effective assistance of counsel as guaranteed by article 1, section 14 of the Hawai‘i Constitution and the sixth amendment to the United States Constitution.

At Smith's 2004 trial, the State's case centered on the expert opinion supplied by chief medical examiner Dr. Kanthi Von Guenther. Thus, effective assistance of Smith necessitated consideration of a rebuttal to Dr. Von Guenther's testimony. Consistent with this duty, trial counsel sought to cross-examine Dr. Von Guenther about her opinion, using an article written by Dr. John Plunkett, a former deputy medical examiner and board certified pathologist from Minnesota. The trial court sustained objection to trial counsel's use of the article, but without prejudice to live testimony. Dr. Plunkett's article provided research on the prevalence of fatal accidental falls in infants and young children and noted that certain testing should be

completed to determine the cause of death in cases where an accidental fall is alleged. Thus, the article refuted the medical examiner's view that the infant's death was not caused by a fall and supported Smith's sole defense: he accidentally dropped his son.

In response to the trial court's exclusion of the article, trial counsel represented to the court that, absent Dr. Plunkett's article, it would be necessary to request a continuance to call the doctor as a witness. Concern was expressed by trial counsel that the cost to present Dr. Plunkett's live testimony would be prohibitive. Trial counsel did not inform the court that no effort had been made to contact Dr. Plunkett. Nor does the record indicate that trial counsel requested funds from the administrative judge to present Dr. Plunkett as a witness. The trial proceeded with unrebutted expert testimony from the medical examiner. Throughout her cross-examination, the medical examiner countered the defense of accident. In particular, she identified the injuries as constituting a pattern inconsistent with an accident. Subsequent to Smith's testimony that he accidentally dropped his son, the jury found Smith guilty as charged.

Smith sought post-conviction relief before the circuit court pursuant to Hawai‘i Rules of Penal Procedure (HRPP) Rule

40. The sole issue raised in Smith's Rule 40 Petition was whether his trial counsel was ineffective for failing to seek an expert to review the autopsy report and to provide testimony to support his defense that the death of his son was the result of an accident or negligence.

At the Rule 40 evidentiary hearing, Smith's trial counsel offered an explanation for her decision to forego Dr. Plunkett that was different than the explanation given to the trial judge. No longer was Dr. Plunkett's expert opinion deemed necessary for the defense; nor was prohibitive cost cited as a reason for the loss of his testimony. Instead, trial counsel cited for the first time: 1) her concerns that Dr. Plunkett's article had not been peer reviewed; 2) her prediction that Dr. Plunkett would be cross-examined about Smith's allegedly inconsistent versions of how he had dropped the infant; and 3) her belief that Dr. Plunkett's opinion regarding accidental deaths was in the minority and that he "was the only one" who supported the defense's theory of the case. Notwithstanding the importance of allaying her concerns through discussion with Dr. Plunkett, trial counsel could not recall whether she had ever contacted him. When questioned in this regard, trial counsel stated, "when we saw that [Dr. Plunkett's] article was not peer

reviewed, which is extremely important in these kinds of cases, we stopped our inquiry."

Smith's Rule 40 counsel submitted two affidavits from Dr. Plunkett to support the claim of ineffective assistance of counsel.[1] The affidavits revealed that Dr. Plunkett was not contacted by Smith's trial counsel. The affidavits also provided substantial support for Smith's defense at trial. Specifically, Dr. Plunkett averred that: 1) articles published by Dr. Plunkett in 1999 and 2001 containing his opinion on accidental falls in infants had been subject to peer review; 2) his "opinion that children could suffer fatal injuries in short-distance, accidental falls" was shared by 28 other experts; 3) any fracture to the infant's right orbital area of the skull was caused by an impact to the parietal area of the skull, and not the result of a separate impact; 4) the medical examiner's failure to microscopically examine all of the injuries——other than the injury that resulted in the immediate cause of death—— violated standard protocol and rendered it impossible to determine when the other injuries occurred "and therefore who may have caused them"; and 5) the medical examiner supplied incorrect sworn testimony to the jury that the force required to

[1] The record indicates that Smith's Rule 40 counsel requested funds to provide live testimony from Dr. Plunkett, but that his request was denied.

fracture an infant's skull was greater than the force required to fracture an adult skull.

Notably, trial counsel's judgment that it was unnecessary to discuss the issue of peer review with Dr. Plunkett before deciding to proceed to trial with no expert proved incorrect; had she made contact with Dr. Plunkett, as evidenced by his affidavit, she would have learned that relevant articles containing Dr. Plunkett's opinion had been peer reviewed. As to trial counsel's concern that Dr. Plunkett would be cross-examined on Smith's inconsistent versions of the incident, Dr. Plunkett's affidavit provided support that the cause of death could have been the result of a fall from as little as two to three feet, which is consistent with each of the three accounts provided by Smith. Thus, the affidavit is replete with evidence upon which a jury could find that the medical examiner's rejection of the defense of accident was based on a departure from the standard of care requiring microscopic analysis of the non-fatal injuries, false information regarding the strength of an infant's skull, and a misunderstanding of the prevalence of contrary expert opinion on the issue of the likelihood of fatal injury due to a fall from two to three feet.

To support an ineffective assistance of counsel claim under Hawai‘i law, Smith must demonstrate that 1) his trial counsel committed an error or omission reflecting a lack of skill, judgment, or diligence; and 2) the error resulted in the substantial impairment of a potentially meritorious defense. State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980).

Regarding the first prong of the ineffective assistance of counsel test, "[t]he decision whether to call witnesses in a criminal trial is normally a matter within the judgment of counsel and, accordingly, will rarely be second-guessed by judicial hindsight." State v. Aplaca, 74 Haw. 54, 70, 837 P.2d 1298, 1307 (1992) (alteration in original) (citations omitted) (internal quotation marks omitted). On this basis, and citing to trial counsel's testimony at the evidentiary hearing, the ICA concluded that trial counsel "made an informed and strategic decision not to retain and call Dr. Plunkett as an expert witness." Smith v. State, No. CAAP-14-0000737, 2015 WL 1959256, at *7 (App. Apr. 30, 2015) (mem. op). The ICA's analysis, however, overlooks that there must be "a foundational factual predicate upon which an informed decision whether to call a witness to testify must be based." Aplaca, 74 Haw. at 71, 837 P.2d at 1307. Because trial counsel did not contact Dr. Plunkett, she was unable to make an informed

decision regarding the effect of his testimony on Smith's defense, resulting in an error or omission reflecting a lack of skill, judgment or diligence. See State v. Kahalewai, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972) ("A primary requirement is that counsel must conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf." (citations omitted) (internal quotations marks omitted)).

Per our decision in Aplaca, the decision to forego communication with Dr. Plunkett cannot qualify as effective representation. In Aplaca, an adult corrections officer at a correctional facility, was convicted of assaulting a colleague after the two collided. 74 Haw. at 57-59, 837 P.2d at 1301-02. Aplaca was the only defense witness. Id. at 58, 837 P.2d at 1301. On appeal from the trial court's denial of Aplaca's motion for a new trial, Aplaca argued that trial counsel was ineffective based on his failure to investigate potential defense witnesses. Id. at 58, 67-68, 837 P.2d at 1302, 1305-06. Aplaca provided affidavits from individuals who indicated, inter alia, that they would have testified that she was a "truthful and peaceable person" and that the complaining witness "was not a truthful person." Id. at 68, 837 P.2d at 1306. Trial counsel

admitted that although Aplaca informed him about the potential witnesses, he neglected to contact them prior to trial. Id. at 69, 837 P.2d at 1306. While citing to the deference afforded to counsel on this issue, we noted that "[i]t is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons." Id. at 71, 837 P.2d at 1307 (quoting State v. Templin, 805 P.2d 182, 188 (Utah 1990)). We determined that counsel's "decision not to conduct a pretrial investigation of prospective defense witnesses cannot be classified as a tactical decision or trial strategy" and accordingly, held that "trial counsel's assistance fell below the level of ordinary competence demanded of lawyers in criminal cases and reflected his lack of skill, judgment[,] or diligence." Id. (citation omitted) (internal quotation marks omitted).

Similar to Aplaca, here trial counsel's failure to contact Dr. Plunkett, a potential defense witness, precluded her from making an informed decision regarding his viability as an expert witness and/or consulting expert. Accordingly, trial counsel's decision not to investigate "cannot be classified as . . . trial strategy." Id.; see also Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. 2008) ("When defense counsel merely believes certain testimony might not be helpful, no reasonable

basis exists for deciding not to investigate."); Avila v. Galaza, 297 F.3d 911, 920-21 (9th Cir. 2002) (holding lawyer's decision that testimony may not be helpful at trial did not justify failure to interview witnesses and constituted deficient performance). The decision lacked the knowledge base required to constitute informed trial strategy.

As to the second prong of the ineffective assistance of counsel test, the record demonstrates that trial counsel's error or omission resulted in a substantial impairment of a potentially meritorious defense. Antone, 62 Haw. at 348-49, 615 P.2d at 104. "Determining whether a defense is potentially meritorious requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker . . . ." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) (citation omitted) (internal quotation marks omitted). Thus, "no showing of actual prejudice is required to prove ineffective assistance of counsel." Id. (citation omitted) (internal quotation marks omitted). A review of the record establishes that trial counsel "could have significantly bolstered" Smith's defense that his son's death was accidental or the result of negligence, if she had consulted with and/or retained an expert to rebut the medical examiner's testimony. See State v. Silva, 75 Haw. 419, 442, 864 P.2d 583, 594 (1993).

Aplaca also provides helpful insight as to the significant support of Smith's defense lost as a result of trial counsel's deficiency. The issue in Aplaca was one of intent; because Aplaca admitted that she and the complaining witness had collided, "the focal point was whether such collision was intentional or reckless by Aplaca." 74 Haw. at 72, 837 P.2d at 1308. As here, the credibility of the defendant was also key to the resolution of the case. In Aplaca, there "were no other witnesses to the incident" and so "the outcome of the case depended on the credibility of Aplaca and [the complaining witness]." Id. Based on these circumstances, we determined that character witnesses who would have bolstered Aplaca's credibility "could have had a direct bearing on the ultimate outcome of the case" and accordingly, we concluded that trial counsel's error or omission resulted in the substantial impairment of a potentially meritorious defense. Id. at 73, 837 P.2d at 1308; see also Silva, 75 Haw. at 442-43, 864 P.2d at 594 (holding failure to subpoena witness that "could have significantly bolstered Silva's version of the incident" resulted in substantial impairment of defense where "the jury may well have discounted Silva's uncorroborated testimony as essentially self-serving and therefore doubtful").

Here, the need to bolster Smith's credibility was more important, because his account of the incident was pitted against the unbiased and scientifically-based testimony of the State's expert witness, rather than the self-interested lay witness Alpaca faced at trial. As evidenced by Dr. Plunkett's affidavits, his expert testimony could have rebutted the medical examiner's testimony and supported Smith's account that his son's death was accidental. Although we cannot predict the "exact effect" that consultation and/or testimony from Dr. Plunkett would have on the "outcome of the case," the record establishes it "would [] have cast [] light on the sole defense in this case, that is," that the infant's death was accidental. See Aplaca, 74 Haw. at 73, 837 P.2d at 1308. On this basis, the second prong of the ineffective assistance of counsel test is met.

Smith's counsel was also ineffective under the more stringent federal standard established in Strickland v. Washington, 466 U.S. 668, 694 (1984), which requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Several federal courts have held that where, as here, the State's expert witness testifies regarding crucial medical and scientific evidence, the need for defense counsel to consult

with an expert is underscored. As noted by the United States Court of Appeals for the Ninth Circuit, "[a]lthough it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." Duncan, 528 F.3d at 1235; see also Pavel v. Hollins, 261 F.3d 210, 223 (2d Cir. 2001) (holding counsel's performance was deficient where "he did not call a medical expert to testify as to the significance of the physical evidence presented by the prosecution"); Miller v. Senkowski, 268 F. Supp. 2d 296, 312 (E.D.N.Y. 2003) (determining trial counsel's "decision to not call an expert witness to rebut the prosecution's witness, or at least confer with an expert prior to cross-examination, constituted error and was not related to a valid trial strategy"); Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986) (holding trial counsel's failure to retain expert resulted in deficient performance where, inter alia, "expert testimony would have been helpful in cross-examining and/or rebutting the State's expert"), aff'd sub nom. Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987). In the instant case, there were no witnesses to the incident, other than Smith,

making the medical examiner's testimony crucial to the State's case. Moreover, the medical examiner's testimony "directly contradict[ed]," Duncan, 528 F.3d at 1235, the defense's sole theory of the case, i.e., that the infant's death was accidental. Further, the record does not indicate that trial counsel had any specialized "knowledge or expertise" regarding the medical and scientific evidence relevant to the case, so it was "especially important for counsel to seek the advice of an expert . . . ." Id.; see also Bucio v. Sutherland, 674 F. Supp. 2d 882, 942 (S.D. Ohio 2009) (holding evidentiary hearing appropriate for ineffective assistance of counsel claim based on failure to consult with and seek expert testimony where "[t]here is no evidence that counsel had prior experience in similar cases or special knowledge to enable him to evaluate the competency and strength of the forensic evidence to be presented by the State").[2] Under these circumstances, trial counsel's failure to contact an expert witness previously identified as favorable to the defense, was deficient.

[2] That Smith's defense at trial depended on evidence of his lack of intent, as opposed to the possibility of an alternative perpetrator, further emphasizes counsel's duty to investigate expert evidence. The nature of the evidence necessary to present a plausible defense that the infant's death was accidental required expert assistance. Cf. Duncan, 528 F.3d at 123 (noting counsel "did not have the personal expertise in serology to make strategic decisions about how to handle the blood evidence on his own and he certainly was not qualified to undermine the State's case by simply cross-examining its experts without obtaining expert assistance himself").

Consistent with the finding of prejudice required by the Strickland standard, "there is a reasonable probability that if the jury had heard the additional" evidence provided by Dr. Plunkett, the outcome would have been different. See Duncan, 528 F.3d at 1246-47. As stated in Duncan, to demonstrate prejudice under Strickland, Smith "need show only that the omitted evidence is sufficient to undermine the confidence in the outcome . . . ." Id. at 1246. As discussed above, Dr. Plunkett's affidavit demonstrates that if trial counsel had consulted and/or retained an expert, significant evidence in support of Smith's sole defense at trial would have been before the jury, and it is reasonably probable that this evidence would have changed the mind of at least one juror.

In sum, trial counsel's initial decision to offer Dr. Plunkett's expert opinion at trial to support the theory of the defense and provide the necessary counter to the State's expert, gave rise to the duty to attempt contact with Dr. Plunkett before dismissing his relevant expertise. Some modicum of effort to communicate with Dr. Plunkett was fundamental to Smith's right to effective assistance of counsel. No risk, no detriment, and no disadvantage accompanied communication with the expert. On the other hand, a phone call, on behalf of the defendant—charged with second degree murder of his son and

facing life in prison—would have revealed evidence supporting a potentially meritorious defense, and there is a reasonable probability that such evidence would have altered the outcome of the case.

For the foregoing reasons, I respectfully dissent.

DATED: Honolulu, Hawai‘i, August 7, 2015.

/s/ Michael D. Wilson