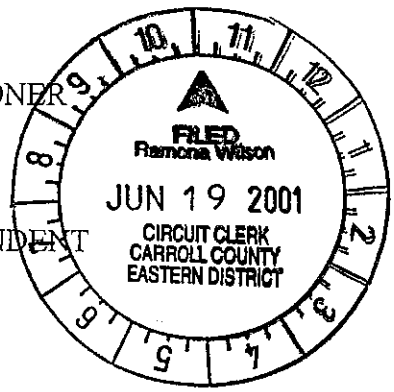
IN THE CIRCUIT COURT OF CARROLL COUNTY, ARKANSAS

BELYNDA FAYE GOFF PETITIONER

VS. NO. CR 95-59-3

STATE OF ARKANSAS RESPONDENT



DECISION

Came on for hearing on February 15, 2001, and on March 30, 2001, Petitioner's request for review pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure, alleging ineffective assistance of counsel at her trial for murder held on and after July 29, 1996. The Court having read the trial transcript, reviewed the trial evidence, heard testimony in the two Rule 37.1 hearings, heard the arguments of counsel, and reviewed the relevant authorities and post-hearing briefs, does hereby:

ORDER, ADJUDGE AND DECREE that the Defendant's petition for determination of ineffective assistance of counsel should be and hereby is GRANTED; and the Defendant is granted a new trial.

FINDINGS OF FACT

1) The deceased was killed on or about June 12, 1994. Trial transcript pg. 439.

2) Petitioner was present in the apartment when the victim was killed. Trial transcript pg. 924, pg. 440.

3) Mr. Charles Davis was hired as petitioner's counsel before June 28, 1994. Defendant's Exhibit 1 Rule 37.1 first hearing, page 63, (hereinafter referred to as "first hearing" or "second hearing").

4) Within a few days of being hired, Mr. Davis and the petitioner went to the crime scene. First hrg. page 61, 64, 67.

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5) Petitioner was told by Mr. Davis that the jury would be very suspicious if death benefits were not applied for. First hrg. pg. 44.

6) State's trial exhibit no. 56 (Claimant's Affidavit-Proof of Death) was prepared by petitioner's attorney prior to trial. Trial transcript pg. 108.

7) State's trial exhibit No. 56 was submitted to the company by Mr. Jeff Watson on or about June 28, 1994. State's trial exhibit no. 54 and first hrg. exhibit no. 1, first hearing pg. 63.

8) Mr. Davis and Mr. Watson were law partners. First hrg. pg. 63.

9) Mr. Davis had no conversations with Mr. Watson who submitted State's trial exhibit no. 56 to the company. First hrg. pg. 64.

10) Mr. Davis had never seen State's trial exhibit no. 56 prior to trial. First hrg. pg. 71.

11) State's trial exhibit no. 56 was never amended. First hrg. pg. 76.

12) Mr. Jeff Watson received a check in the sum of $275,000.00 in October of 1994, payable to the petitioner. State's trial exhibit no. 54, first hrg. pg. 76.

13) The petitioner had always told Mr. Davis that the deceased was killed in Green Forest, not Carroll County. First hrg. pg. 84, State's trial exhibit no. 56.

14) The petitioner was arrested on May 3, 1995, and first appeared in court on May 23, 1995. Court file, warrant return and docket entry.

15) Mr. Steve Vowell began to co-represent the petitioner in May of 1995. First hrg. pg. 32.

16) The defense theory was that the beating occurred outside the apartment, then completed inside the apartment. First hrg. pgs. 80, 82, 85-86.

17) The forensic evidence demonstrated that the killing occurred inside the apartment and there was no evidence it occurred outside the apartment. First hrg. pg. 82-83, 85-86.

18) Mr. Steve Vowell believed the petitioner did not know what had happened to her husband. First hrg. pg. 93.

19) Mr. Mark Lenneville testified that Mr. Davis told him that the victim was

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killed at another location and taken back to the apartment because the "splat reading" was not consistent with the crime occurring in the apartment. Second hrg. pg. 49-50.

20) Petitioner never met with Mr. Vowell to go over the case documents prior to trial. First hrg. pg. 42.

21) Petitioner had a full hysterectomy in March of 1994. Second hrg. pg. 54.

22) Petitioner was still taking medication on the day of the homicide and had taken medication that evening. Second hrg. pg. 54.

23) The medical expert testified that one of victim's injuries were consistent with an object similar to the head of a hammer. Trial transcript pg. 784.

24) State's trial exhibits no. 8 and 9 (hammers) contained no trace of blood and could not be identified as the murder weapons. Trial transcript pg. 601.

25) Indentations in wall above victim's body could not be matched to State's trial exhibits no. 8 and 9. Trial transcript pg. 815-816.

26) State's trial exhibits 13 through 17 and 19 through 28 (towels) held no trace of the victim's blood. Trial transcript pg. 605 – 606.

27) No blood traces were found on State's trial exhibit 18 (bathmat). State's trial exhibit 41 (photo of same bathmat found outside of building) Trial transcript pg. 605 – 606.

28) No traces of blood were found on clothing Defendant was wearing the evening before the homicide and clothing Defendant was wearing when officers arrived immediately after the body was discovered. Defendant's exhibit 8 and 9, Trial transcript pgs. 579, 605 and 606.

29) A trace amount of the victim's blood was found in the bathtub drain. Trial transcript pg. 630.

30) One blood drop was found on the bathtub edge but was not identified as victim's blood. Photograph Exhibit 40, Trial transcript pg. 629.

31) DNA testing of blood drop on vanity door was determined to be that of the victim's son. E19, State's Exhibit 52, Trial transcript pg. 633.

32) Hair samples from the victim's left side and left hand were found by the

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coroner at the crime scene and taken into evidence by the investigating officer. Trial transcript pgs. 492 – 493. No further reference was made to such samples.

33) Victim's blood-splattered keys were found on floor just inside door near the body. Trial transcript pg. 493.

34) Petitioner's upstairs neighbors heard three knocks on petitioner's door, followed by muffled thumps in the victim's apartment during the night. Trial transcript pg. 718.

35) Petitioner's upstairs neighbor could not remember hearing water running in the victim's apartment during the night and testified she was able to hear water running in the apartment below. Trial transcript pg. 724.

36) Chris Lindley is the petitioner's brother. Second hrg. pg. 9.

37) Chris Lindley had several phone calls and/or personal contacts with the victim over approximately one year's time prior to the deceased's death. Second hrg. pgs. 10-23.

38) Chris Lindley involved himself with the victim in an arson for hire. Second hrg. pages 13 and 18.

39) Shortly before his death the victim spoke several times with Chris Lindley. Second hrg. pgs. 18 – 23.

41) Just a few days prior to the victim's death, the victim called Chris Lindley, very distraught and in fear for his life. Second hrg. pages 26 – 28.

42) Shortly after the victim's death, Chris Lindley received an anonymous phone call connecting the victim's death with a threat to his own life. Second hrg. pgs.no. 24 – 25.

43) Chris Lindley quickly sold the home where he received the threatening phone call and moved. Second hrg. pages 25 – 26.

44) Chris Lindley was subpoenaed to trial and was present at trial. Second hrg. pgs. 26 – 28.

45) Chris Lindley was never called as a witness at trial. Second hrg. pg. 28.

46) Chris Lindley had no felony convictions. Second hrg. pg. 39.

47) Phone records reflect calls to Chris Lindley from the victim's apartment

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between May 16, 1994 and May 25, 1994. Second hrg. pgs. 52 – 53.

48) Phone records from victim's apartment to Chris Lindley were made available to Mr. Davis prior to trial. Second hrg. pg. 53 – 54.

49) Petitioner's rent house was burned by an incendiary act after the petitioner's arrest but prior to her trial. Second hrg. pg. 57 – 60.

50) Petitioner has consistently denied killing the victim, her husband. Trial transcript pg 941, 954, 955. First hrg. 92 – 93.

CONCLUSIONS OF LAW

1) Mr. Davis and his law firm, Davis and Watson, P.A., for their role in preparing, presenting, or assisting in preparing what became known as State's Trial Exhibit No. 56, violated the following model rules of professional conduct and thus fell below an objective standard of competence. Wicoff v. State, 321 Ark. 97 (1995).

a) Rule 1.1. One of the most elemental responsibilities of a lawyer to a client is his job of determining what is the scope of the legal problem presented. This responsibility presumes adequate preparation as dictated by the gravity of the case.

b) Rule 1.7(b). While not a "classic" model rules conflict case, Mr. Davis, through his law partner, created a conflict with the interests of his client in the preparation of a document that assured adequate resources to pay his fee but placed his criminal defense client in peril.

c) Rule 3.7. When it became apparent that a document prepared through the auspices of his office would be used against his client, Mr. Davis and Mr. Watson became crucial witnesses to the defense of their client.

d) Rule 5.1(c)(i). Mr. Davis offers his partner Mr. Watson as the lawyer responsible for the preparation, presentation, or assistance given to their client in

presenting a document that clearly harmed the client's defense.

2) Mr. Davis' failure to call Mr. Chris Lindley to testify regarding at least some of his conversations and dealings with the deceased just prior to his death is an omission that falls below an objective standard of competence. Wicoff v. State, 321 Ark. 97 (1995).

3) The State's case is a highly indirect circumstantial case.

ANALYSIS

THE AFFIDAVIT:

In order to see the full impact of counsel's decisions in this case, it must be recalled throughout that the State's evidence in State v. Goff was virtually all indirectly circumstantial. Of course that observation alone would not carry the legal weight necessary to find for the petitioner in this Rule 37.1 hearing. However, Mr. Davis' participation in the creation of State's Trial Exhibit No. 56, described by the Arkansas Supreme Court on direct appeal as "a defendant's false and improbable statement explaining suspicious circumstances and admissible as proof of guilt", when coupled with counsel's failure to call the defense's only available witness to establish that a third party may have committed the crime, the conclusion must be reached that counsel's behavior was objectively below a reasonable standard and that behavior resulted in prejudice to Goff

The crime at issue occurred on June 12, 1994. Mr. Davis caused a claimant's affidavit-proof of death form to be submitted under his firm's letterhead on June 28, 1994. Mr. Davis visited the scene of the crime shortly after being hired, presumably

before June 28, 1994. The affidavit contained factual statements that were entirely at odds with the crime scene evidence. The affidavit was never amended or explained. Mr. Davis thought it would be suspicious to fail to file for death benefits. Mr. Davis was compensated from the death benefits paid to Goff. Mr. Davis told a witness, Mark Lenneville, that he believed the victim was killed at another location and returned to the apartment. He based this theory on his conclusion that the blood splatterings at the scene were not consistent with the crime occurring at the apartment.

The primary obligation of a lawyer to a client, perhaps particularly a criminal defense client, is to determine what the State's case is before doing anything that could harm the client's case. (Model Rules of Professional Conduct, Rule 1.1) Here, Mr. Davis' firm participated in the presentation of an affidavit by Goff to her employer for the purpose of securing death benefits from her husband's death.

Mr. Davis testified that he directed Goff to his partner for assistance with her insurance question. He further testified that he never again spoke with his partner about the insurance matters, and he had never seen the problem affidavit until time of trial. Mr. Steve Vowell testified that he was sure the affidavit was part of the documents received either through discovery or from Mr. Davis.

It became apparent at or before trial that the affidavit would be used against Goff. Mr. Davis testified that he saw no problem with the affidavit because it was consistent with her original story. Goff says she was advised to use the words found in the affidavit by Mr. Davis.

Perhaps if the issue was merely one of who to believe, little would come of this dispute. But Mr. Davis went to the scene shortly after being hired and saw the numerous

blood splatterings in the apartment. Mr. Davis had been a criminal investigator. Even if the evidence at the scene was not conclusive that the crime occurred there, it was clearly evidence that should have put a reasonably prudent lawyer on notice that making or allowing his client to make factual statements regarding the scene without more study was dangerous.

In Wicoff v. State, 321 Ark. 97, 200 S.W. 2nd 187 (1995), the Supreme Court articulated the standard by which trial attorney behavior should be judged as ". . . conduct (which) falls below an objective standard of competence . . . ". In the case at bar, based upon the Model Rules, Mr. Davis' decision to go forward with the submission of what became known as State's Trial Exhibit No. 56, to Goff's employer, caused her own words to stand against her when the evidence available to counsel at that time, should have caused him to advise his client not to submit the affidavit or to state it in more general terms.*

This decision fell below the conduct expected by a reasonably competent attorney and was very prejudicial to Goff. Wicoff

Mr. Davis' desire to be paid for his services, while normally prudent and reasonable pursuits, in the circumstances of this case caused him to come into conflict with his client's interests. Model Rule 1.7(b) requires a lawyer to decline representation if that representation may be materially limited by . . . the lawyer's own interests.

When, despite the available evidence to the contrary, Mr. Davis caused or allowed

*Mr. Davis' firm received a check payable to Goff in the sum of $275,000. Some or all of the lawyer's fee was paid from this receipt.

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his client to make factual representations in writing so that his interests were met, i.e., to be paid his fee, then his conduct fell below an objectively reasonable standard that caused harm to his client. Wicoff.

Once it became apparent that the affidavit would be used against Goff, it was incumbent on Mr. Davis to do one of three things: a) amend the affidavit and offer an explanation for it; b) withdraw from representing Goff and testify as to how the affidavit came to be submitted; or c) withdraw and offer the testimony of his law partner as to the facts and circumstances of the affidavit's preparation. (Model Rules of Professional Conduct 3.7)

None of these steps were taken. Indeed, Mr. Davis testified that he did not see the problem because the affidavit matched her statements from "the get go".

The conclusion seems inescapable that such decision making falls below an objective standard of reasonableness and caused harm to Goff.

Mr. Davis testified in a manner that caused this Court to conclude that he believed he was entirely relieved of any responsibility for what happened with Ms. Goff's case as a result of what she said or did with his partner regarding the insurance matters associated with the criminal case. There was even some factual dispute as to who advised Ms. Goff concerning the language used in the problem affidavit. Nevertheless the Model Rules seem to be clear that a lawyer is responsible for another's violation of the rules of professional conduct when the lawyer has knowledge of the specific conduct and ratifies the conduct, or the lawyer is a partner in the law firm where the other lawyer practices and knows of the offending conduct, when it can be avoided but fails to do so. Model

Rules of Professional Conduct, Rule 5.1 (c) (1)(2)

Here, Mr. Davis referred Goff to his partner for help with her insurance concerns. Mr. Davis had visited the crime scene with Goff before June 28, 1994, when the insurance claim was submitted by Mr. Watson, Mr. Davis' partner. Mr. Davis never took steps to avoid or mitigate the harm caused by his partner's (or his own) actions. Such behavior fell below the objectively reasonable standard set forth in Wicoff v. State, 321 Ark. 97 (1995) and was prejudicial to Goff.

CHRIS LINDLEY'S TESTIMONY:

Chris Lindley is Ms Goff's brother. Mr. Lindley testified that he was recruited by Mr. Goff (the deceased) to assist him in the commission of a criminal act. Mr. Lindley, at various times consented and then withdrew from the agreement. Mr. Goff, at one time, traveled to Illinois to meet with Mr. Lindley in regard to the proposed crime. Sometime later, Mr. Goff told Mr. Lindley that he had found someone else to help him commit the crime. Then, even later, Mr. Goff called Mr. Lindley to say that his new help had backed out. Lindley again agreed to help Mr. Goff. A few days before Mr. Goff's death, Lindley again backed out. Mr. Goff was distraught and revealed much that he had failed to reveal prior to that time. Mr. Goff told Mr. Lindley that the men who hired him paid him $10,000 and were not his friends (as he had previously stated), and he could not repay them. Mr. Goff told Mr. Lindley that those men would kill him if he did not go through with the job. Lindley refused. Mr. Goff called again immediately prior to his death saying he would be killed if he didn't do the job. Mr. Lindley never heard from Mr. Goff again. A few days later Mr. Goff was found dead. Mr. Lindley testified that two days after Mr. Goff's death, he received a phone call threatening his life if he spoke

of the arson. Mr. Lindley testified that he took immediate steps to sell his home, sold his home, and moved.

Mr. Lindley testified that he related those same facts to Mr. Davis several months before the Goff trial. Mr. Lindley was subpoenaed to trial by the defense and was present at trial, ready and willing to testify. Phone records belonging to Ms. Goff for the month of May, 1994, were in Mr. Davis' possession and were introduced through Mr. Davis at the March 30, 2001, Rule 37.1 hearing. Those phone records showed two calls made in late May 1994 from the Goff phone to the Lindley home. Mr. Lindley was never called as a witness. This Court's appraisal of Mr. Lindley as a witness is that he was credible. He had no felony conviction. He had, within the last few years, been honorably discharged from the U.S. Marine Corp., he was employed as a carpenter, he was married and had children. All in all his story, though unusual, was delivered in a credible fashion and caused this Court to seriously consider what he had to say.

In 1993 the Arkansas Supreme Court articulated the standard by which the admissibility of testimony such as Lindley's should be determined. In Zinger v. State, 313 Ark. 70, 852 S.W. 2d 320 (1993), the Court ruled that a defendant could introduce evidence to show that someone other than the defendant committed the crime only when it pointed directly to the guilt of a third party. If the evidence merely created an inference or conjecture as to another's guilt it was inadmissible. Citing, State v. Wilson, 367 S.E. 2d 589 (N.C. 1988). In further defining the parameters of this defense, the Court said that evidence of mere motive or opportunity to commit the crime in another, without more, was not sufficient, there must be direct or circumstantial evidence linking the third party to the perpetration of the crime. Citing, People v. Kaurish, 802 P. 2d 278 (Cal. 1990).

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The Court has followed these rules in subsequent cases. See: Johnson v. State, 342 Ark. 186, 27 S.W. 3d 405 (2000), and Birmingham v. State, 342 Ark. 95, 27 S.W. 3d 351, (2000).

In the case at bar, Mr. Goff had related an immediate fear of death as a result of a criminal act he had failed to carry out. Mr. Lindley's testimony about the death threat he received would have corroborated the existence of individuals involved in Mr. Goff's death and it points to someone else's responsibility for his death.

A neighbor (whose testimony was excluded at trial but whose testimony may have been allowed if Lindley's had been offered or proffered) had a conversation with two strangers who had baseball bats in their car the evening before Mr. Goff's death at the apartment complex, looking for the person who lived in the Goff apartment.

Since Lindley's testimony was not about events remote in time or place, his testimony would have been admissible as to Mr. Goff's statements pursuant to ARE 803(1), 803(2), and the latter statements by Mr. Goff would have been admissible under 804(b)(2) as a statement by a declarant while believing that his death was imminent.

Some of Mr. Goff's statements may have been admissible under 804(b)(3) as statements against interest since the declarant was unavailable. The threats made to Mr. Lindley two days after Mr. Goff's death were admissible under 803(3) as statements revealing the declarant's state of mind and intention.

Mr. Lindley was never called to testify nor was his testimony ever proffered to the Court in sufficient detail to obtain the Court's ruling with regard to its admissibility. Mr. Davis testified that he thought Lindley's testimony, as a relative, would only alienate the jury.

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In Strickland v. Washington, 466 U.S. 668 (1984), a lawyer's strategic decisions on who to call as a witness must still be judged by whether counsel's assistance was reasonable considering all the circumstances. 466 U.S. 688. Our Supreme Court has ruled that, "where trial counsel failed to call, in Russell's trial for murder, a witness whose testimony could have created a reasonable doubt in the minds of the jurors, as this evidence could have established that State's eyewitness had a motive to kill the victim". Russell v. State, 302 Ark. 274, 789, S.W. 2d 720 (1990), Post-conviction relief granted.

In the Russell case the Court concluded that counsel's explanation as to why he did not call a witness was not supported by reasonable professional judgment and determined that there was a reasonable probability that the outcome of the trial would have been different had the witness been called. At the Rule 37 hearing, counsel offered no reason for declining to call the witness and that Court held that the omitted witness could have established that a third party had a motive to kill the deceased.

In the case at bar, and similar to the Russell case, Mr. Davis' failure to call Mr. Lindley deprived the jury of the opportunity to hear testimony from a witness whose evidence could have created reasonable doubt in their minds since his evidence could have established another explanation of the facts supporting the State's circumstantial evidence. This caused Mr. Davis' performance to fall into the category of ineffectively representing his client in her murder trial, thus preventing her from receiving a fair trial and placing the outcome in doubt.

This Court must conclude that there exists a reasonable probability but for counsel's failure to call Mr. Lindley and adequately proffer his testimony, the result of this trial would have been different.

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CONCLUSION

Taken together, the submission of the affidavit and the failure to call Mr. Lindley comprise ineffective assistance of counsel by Mr. Davis. Trial counsel's conduct failed to meet an objectively reasonable standard and his acts and omissions clearly resulted in prejudice to Goff.

JAY T. FINCH, Circuit Judge

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