

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. [REDACTED]
DIVISION 11A

vs.

[REDACTED]
Defendant.
_____ /

ORDER GRANTING DEFENDANT'S MOTION
TO VACATE OR SET ASIDE JUDGMENT

THIS MATTER came before the Court upon Defendant's Motion to Vacate or Set Aside Judgment and Sentence, filed on April 20, 2020. The Court having reviewed the Motion, the State Response, the court file, and being otherwise fully advised of the premises, makes these findings and conclusions of law:

FACTUAL BACKGROUND

On October 4, 2016, the State charged Defendant by Information with Attempted First-Degree Murder with a Firearm in Count 1, Robbery with a Firearm with a Mask in Count 2, Attempted Robbery with a Firearm with a Mask in Count 3, and Grand Theft in Count 4.

On February 15, 2017, after a jury trial, Defendant was found guilty as to Count 1 of the lesser offense of Attempted Second-Degree Murder. The jury made special findings that Defendant did carry, display, use or threaten to use a firearm, that Defendant actually possessed a firearm, and that Defendant actually discharged a firearm. The jury also found Defendant guilty as charged as to the remaining three counts.

On June 9, 2017, the Court sentenced Defendant to 20 years in the Department of Corrections for Count 1, Count 2, and Count 3. The Court also sentenced Defendant to five years in the Department of Corrections for Count 4, with all counts and sentences running concurrently. Defendant was awarded 262

days credit time served. Defendant timely appealed. On April 20, 2018, the Fifth District Court of Appeal *per curiam* affirmed Defendant's conviction. *Cabreja v. State*, 243 So.3d 405 (Fla. 5th DCA 2018).

Defendant filed the instant Motion on April 20, 2020. The State filed its Response on December 27, 2020. Defendant filed his Reply on January 19, 2021. Defendant asserted six grounds in his motion. The Court granted an evidentiary hearing on Grounds Two through Six.

In Ground Two, Defendant claims that counsel was ineffective for failing to object when the State improperly vouched for the co-defendant, Myles Partipilo. As a result of the comments, Defendant contends that the State "denigrat[ed]" his "constitutional right to maintain silence and innocence."

In Ground Three, Defendant alleges that counsel provided ineffective assistance by advising Defendant not to testify at trial. Defendant states that he told defense counsel that he was at a recording studio in his mother's garage on the night of the robbery. However, Defendant alleges counsel did not investigate this alibi defense and advised him not to testify at trial. Defendant claims that "his own alibi testimony would have worked together with the testimonies of seven other alibi witnesses, resulting in a different outcome for the trial.

In Ground Four, much like Ground Three, Defendant contends that counsel was ineffective for failing to investigate and present an alibi defense based on the testimony of multiple witnesses and cell phone evidence.

In Ground Five, Defendant claims that counsel was ineffective for failing to call Victor Costas as a witness at trial to refute the testimony of Myles Partipilo. At the evidentiary hearing, Defendant abandoned this claim.

In Ground Six, Defendant claims that the cumulative effect of the trial counsel's ineffective assistance requires relief.

DISCUSSION

Defendant has alleged that his trial counsel provided ineffective assistance of counsel in violation of his right to effective assistance of counsel. Each allegation is discussed below.

Ground Two – Failing to object to the prosecutor vouching for Myles Partipilo’s testimony in closing argument.

As to the allegation that trial counsel was ineffective for failing to object to the prosecutor vouching for Myles Partipilo’s credibility in closing arguments, the Court finds that Defendant has satisfied the two-prong test for ineffective counsel as outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant has shown that his trial counsel’s representation fell below an objective standard of reasonableness, and such deficient performance prejudiced Defendant.

The co-defendant was the principal witness against the Defendant, and the State, at different times in closing, vouched for that witness’s credibility. Defense counsel’s failure to object to the prosecutor’s vouching allowed the prosecutor to improperly bolster the co-defendant’s credibility, which may have influenced the jury’s verdict. Accordingly, the Court finds that the defense counsel’s failure to object fell below an objective standard of reasonableness and constituted deficient performance.

Co-defendant Myles Partipilo’s testimony was vital to the case against the Defendant. As Defendant’s attorney had failed to present an alibi defense and advised Defendant not to testify, the State’s key witness was the most substantial evidence against Defendant. Vouching for his credibility further solidified the impression of the Defendant’s guilt. Counsel’s failure to object and move to strike constituted deficient performance and deprived Defendant of a fair trial and a reliable outcome.

Ground Three - Advising Defendant not to testify at trial.

As to the allegation that trial counsel was ineffective for advising Defendant not to testify, the Court finds that Defendant has satisfied the two-prong test for ineffective counsel. Specifically, Defendant has demonstrated that counsel’s advice

not to testify was deficient, and this deficient performance prejudiced Defendant's case.

Defendant states that he did not commit the crimes he was charged with and further claims that he was not present at the scene of the offense. The Defendant had witnesses who had reached out to defense counsel and offered to testify about the Defendant's alibi. However, defense counsel called none of those witnesses to testify, leaving only Defendant to present evidence for the jury to consider regarding an alibi and his denial of the offenses charged. But because defense counsel advised Defendant against testifying, the jury heard no testimony that would have supported his alibi defense. Depriving an individual of the opportunity to explain to the jury his side of the story crippled Defendant's ability to present a viable alternative to the State of Florida's narrative.

The Court finds that counsel's failure to advise the Defendant to testify in a situation like this constituted deficient performance. Indeed, the decision not to testify is a critical decision that ultimately rests with a defendant, but it should be made after consultation with competent counsel. Counsel's role is to advise and assist the Defendant in making an informed decision. As Defendant's testimony would have been the only evidence presented for the jury to consider an alibi defense, it was critical that the Defendant be advised to testify to provide an essential counterbalance to the State's theory of the case. The failure to present this defense at trial due to the counsel's deficient performance deprived the Defendant of a fair trial and a reliable outcome.

Ground Four – Failing to investigate and present evidence of alibi defense from Dorothy Rodriguez and Carlos Rivera

As to the allegation that trial counsel was ineffective for failing to investigate and present evidence regarding an alibi defense, the Court finds that Defendant has satisfied the two-prong test for ineffective counsel established by *Strickland*. Defendant has shown that his trial counsel's representation fell below an objective standard of reasonableness, and such deficient performance prejudiced Defendant.

With respect to the first prong, a competent attorney would have conducted a reasonable investigation and called the witnesses who could have supported Defendant's alibi defense and refuted testimony from the state witness. Defendant had witnesses who would have testified that they were with Defendant at the time of the incident. Specifically, the witnesses would have told the jury that at the time of the incident, the Defendant was in his studio, which was in his mother's garage, making music with friends. Defendant's mother, who would have been one of the alibi witnesses, testified at the evidentiary hearing that she was on electronic monitoring. The electronic monitoring system could easily verify her whereabouts to corroborate her testimony. Other witnesses would have testified that the Defendant was with them in his mother's garage at the studio. By not providing this testimony to the jury for consideration, Defendant was deprived of a potentially viable defense to the charge.

With respect to the second prong, *Strickland* requires more than a showing that the errors had some conceivable effect on the outcome. Defendant must demonstrate a reasonable probability, i.e., one that undermines confidence in the outcome-that absent counsel's errors, the fact finder would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 694; *see also Lanier v. State*, 709 So. 2d 112, 116 (Fla. 3d DCA 1998) (Levy, J., concurring) ("a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors") (citing *Strickland*, 466 U.S. at 694-696).

Here, the Court finds that Defendant has shown that, because of his trial counsel's deficient performance, the trial's outcome would have been different. At the very least, the jury would have had for its consideration testimony from Defendant's mother, Dorothy Rodriguez, and Carlos Rivera, both of whom testified at the evidentiary hearing that Defendant was at his mother's home in his garage studio making music and hanging out with his friends at the time of the crime. Granted, the jury could have believed or disbelieved all or any part of either witness's testimony. But that consideration in deliberations only occurs if the jury is

presented with evidence in the first place. Defendant's counsel did not give any such evidence for the jury to consider. Had the alibi evidence been presented at trial, there is a reasonable probability that the mother's and Mr. Rivera's testimony could have created a reasonable doubt in the mind of at least one juror, and the outcome may have been different. Defendant has satisfied both Strickland prongs in showing his counsel's deficient performance was prejudicial.

Ground Six: Cumulative errors warrant relief.

As stated in Ground Six of Defendant's motion for ineffective assistance of counsel, the cumulative effect of trial counsel's errors in Grounds Three, Four, and Five warrant relief. The Court agrees. These errors alone are sufficient to call into question the fairness of the trial.

Accordingly, Defendant's Motion for Ineffective Assistance of Counsel is hereby GRANTED. The Court VACATES Defendant's conviction and orders a new trial. Defendant shall be remanded to custody pending trial.

Status hearing set for May 18, 2023, at 1:30 p.m. in Courtroom 5F.

DONE and ORDERED in Kissimmee, Osceola County, Florida this 11th day of May, 2023.



eSigned by WILSON, TANYA DAVIS
on 05/11/2023 15:02:07 -RWWnCj0

TANYA DAVIS WILSON
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 11th day of May, 2023, by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.



eSigned by WILSON, TANYA DAVIS
on 05/11/2023 15:02:07 -RWWnCj0

Judge Wilson