SUPREME COURT
OF ARIZONA

STATE OF ARIZONA,	)	No. CR-20-0383-PR
	)	
Respondent,	)	
	)	2 CA-CR 2019-0012-PR
vs.	)	
	)	
RONALD BIGGER,	)	Pima County CR 20043995-002
	)	
Petitioner.	)	
	)	
	)	
	)	

STATE'S RESPONSE TO PETITION FOR REVIEW TO ARIZONA SUPREME COURT

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ISSUES PRESENTED

1. Whether the Opinion from the Court of Appeals altered existing law and rules to require a standard-of-care expert affidavit to establish a claim of ineffective assistance of counsel.

2. Whether the Court of Appeals erred by finding that the trial court did not abuse its discretion by concluding that Bigger had failed to state a claim of ineffective assistance of counsel because he had not shown that trial counsel's decisions were other than tactical or that her performance fell below prevailing professional norms.

3. Whether *Perry v. New Hampshire* constitutes a significant change in law.

4. Whether the Court of Appeals erred by not declaring A.R.S. § 13-4234(G) unconstitutional.

STATEMENT OF THE CASE

The State adopts Bigger's Statement of the Case.

STATEMENT OF FACTS

The State is unable to adopt Bigger's Facts.

From 2001 to 2002, David Stidham and Bradley Schwartz worked as pediatric ophthalmologists in a practice owned by Schwartz. (JT 17, p. 31)[1]. After Schwartz's license was suspended, Stidham left the practice and started his own practice. (Id. at 45). When Schwartz returned following his suspension, his business was not doing well and he blamed Stidham. (JT 5 at 15).

On October 5, 2004, a little after 10:00 p.m., Stidham was found murdered in the parking lot of his office building. (JT 3, pp. 130, 158, 166, 175). There were papers scattered around the body, one of which was a vehicle registration for a 1992 Lexus showing the registered owner as David Stidham, but it wasn't in the parking lot. (Id. at 174). Stidham's car was found two days later. (JT 7, p. 135-136).

[1] Hyperlinks to Record on Appeal are taken from Arizona Court of Appeals–Division Two, 2 CA-CR 2007-0244, *State of Arizona v. Ronald Bruce Bigger*.

Over the course of the next several days, law enforcement was contacted, both directly and through a silent witness hotline, by several women who reported that a man they had dated, Schwartz, had told them that he wanted Stidham injured or dead, and he tried to recruit them to accomplish this for him. (JT 1, pp. 80-82, 83-84; JT 2 91-93, 117; JT 3, pp. 49, 86-88; JT 5, pp. 26-27).

One woman, Lisa Goldberg, reported that she had been at Schwartz's office on October 5, 2004, around 4:00 p.m. and met Bigger there. (JT 1, p. 57). Later, Bigger joined Schwartz and Goldberg while they were at dinner. (Id. at pp. 62-63). After dinner, the three of them returned to Schwartz' office to retrieve Bigger's bicycle, but it wouldn't fit in the car. (Id. at p. 64). Next, Schwartz drove to an ATM machine which he and Bigger got out of the car to use. (Id. at p. 66). Schwartz then drove to a Residence Inn where he paid for a room for Bigger. (Id. at pp. 76-78).

Goldberg said there were several unusual remarks made during the course of the evening. She said that when retrieving the bicycle, Schwartz asked her if she had seen the knife on the front of Bigger's bike (she testified there was no knife). (Id. at p. 64). She said Schwartz had asked Bigger "how the scrubs worked out." (Id. at p. 65).

A review of Schwartz's cell phone records revealed a call made from his phone to a convenience store across the street from where Stidham was murdered. (Id. at 96-97). Detectives interviewed a convenience store clerk, Jennifer Dainty, who was working during the relevant time period. (JT 1, p. 170). Dainty reported that a man wearing blue scrubs had been in the store on October 5 around 6:00 p.m. and had used the store phone. *Id*. During one of the phone calls, the man in scrubs said something like, "I can't believe that you are not answering your phone tonight of all nights." *Id*. at p. 169. She said about ten minutes after he left, around 7:00 p.m., she got a call from a man who said someone had called him from that phone. *Id*. at 170. Dainty picked Bigger out of a six pack lineup. *Id*. at 173.

On October 6, 2004, Schwartz went to the bank and withdrew $10,000 in cash. (JT 9 at p. 109). The surveillance photos from the bank show Schwartz on his cellphone at 12:11 p.m. and his cellphone records show a call being made to the Residence Inn at 12:10 p.m. (JT 11 p.m., p. 100). Later Bigger appears at the home of some friends with a lot of cash and crack. (JT 6, p. 14). The next day Bigger, his girlfriend and another fellow leave for a trip to Las Vegas which Bigger paid for. (JT 6, p. 52).

ARGUMENT

1. The COA Opinion did not create a new rule.

Bigger and the two *amicus curiae* argue that the COA Opinion in this case created a requirement that henceforth all IAC claims must be substantiated with a standard of care expert affidavit. The State did not read the Opinion to require any such thing. Rather, the COA (and the trial court) simply said that it was not enough to merely disagree with trial counsel's strategy and tactical decisions when there was no showing that trial counsel was either inexperienced, inept or failed to adequately prepare the case.

AACJ suggests there are areas of a lawyer's representation of a defendant that are not black and white. They argue that strategy is being used in two ways: one to describe the discretionary nature of certain choices attorneys must make in defending a case and, two to distinguish particular informed, intentional, goal-directed decisions from actions resulting from misunderstanding, inattention, or similar error. But like Bigger, they do not offer how trial counsel could have otherwise defended the case and they do not point to any misunderstanding, inattention or error of trial counsel.

The APDA argues that if the COA opinion is a new rule that would require standard of care expert affidavit or even consultation with such an

expert, it would increase the cost and time necessary to file a post-conviction relief petition. The State does not contest this argument if the COA Opinion did create a requirement for such an affidavit; which it did not. As the APDA observed, "[f]or decades trial courts have demonstrated the ability to consider the facts and circumstances of IAC claims and determine whether representation fell below objective reasonable standards." The trial court showed exactly that ability and found that Bigger's claims failed on both the first and second prongs of *Strickland*. (ROA 437-S, p. 9).

In this case, Rule 32 counsel disagreed with the trial strategies and decisions made by trial counsel. Rule 32 counsel never offered why it was objectively unreasonable for trial counsel to litigate the case as she did except to say that her theory of the case was ludicrous. Rule 32 counsel never offered what trial counsel could have done differently given the evidence she had that would have changed the outcome for Bigger.

Bigger argues that the COA turned the *Strickland* inquiry on its head by suggesting that mere disagreement with trial counsel's performance was not enough to establish IAC. If the COA had found otherwise, it would have gutted the *Strickland* inquiry and reasoning. An IAC claim would be established every time Rule 32 counsel disagreed with trial counsel's

performance. As stated in *State v. Pandeli*, 242 Ariz. 175, ¶8 (2017), "Simply disagreeing with strategy decisions cannot support a determination that representation was inadequate. *Strickland*. at 689, 104 S.Ct. 2052 ("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."). The COA did not err by finding that Bigger had not stated a colorable claim of IAC.

2. The COA did not err by finding the trial court did not abuse its discretion by dismissing Bigger's IAC claims.

Trial counsel actively pursued many theories over two and half years in this case. (ROA 374-S, pp. 6-8). Bigger argued below that he had an airtight alibi in his witness, Erin Sullivan, a waitress at Denny's. But, Sullivan testified that she did not recall him eating anything, she did not recall sharing french fries with him, she was not sure if he was there for one half hour or longer or less, whether she had waited on him on previous occasions, and most importantly, whether she had actually waited on Bigger on the evening of October 5, 2004. (No. 159, pp. 12-25).

In this Court, Bigger argues that Schwartz had a rock solid alibi and it was ludicrous to try to argue that he was the killer. But as the trial court observed, "[u]ltimately, the errors alleged by [Bigger] were minor when viewed in the context of the entire trial and relative to the evidence of [his] guilt. The trial lasted nine weeks. Numerous witnesses testified, and the Court admitted 247 exhibits. Defense counsel had a difficult case to defend." (ROA 437-S, p. 10). Clearly Rule 32 counsel continues in his opinion that trial counsel's strategy and decisions were not reasonable, but the analysis by both the trial court and the COA does not support this opinion. The COA did not err by finding the trial court did not abuse its discretion by dismissing Bigger's claims of IAC.

3. The COA did not err by finding that Perry v. New Hampshire was not a significant change in the law.

Bigger incorrectly states that the holding in *Perry v. New Hampshire*, 565 U.S. 228 (2012), was that the due process clause of the Fourteenth Amendment does not require suppression of identification evidence if the jury is instructed on how to weigh such evidence. That is not the holding of the *Perry* Court. Rather, it is part of a discussion the majority of the Court

engaged in to explain why the Court was unwilling to enlarge the domain of due process as urged by Perry. In that discussion the Court recognized:

> "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. *See Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant."). Another is the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence."

In fact, *Perry* affirmed the Court's jurisprudence on pretrial identifications. The COA in *State v. Nottingham*, 231 Ariz. 21, 26 (App. 2012), relying on the reasoning in *Perry,* made a cautionary jury instruction available even in the absence of a formal finding by a trial court of suggestive circumstances upon request. In Bigger's case, the trial court held a two day *Desserault* hearing and determined that the six-pack lineup was not tainted or unduly suggestive. (No. 175, p. 99). Bigger vigorously cross-examined Dainty and the involved detectives about the pretrial identifications. He questioned the reliability of their identifications in opening statements and

closing arguments. He also presented a blind expert, Gregory Loftus, to explain to the jury how inaccurate memories and identifications come about. Bigger used all the adversarial tools discussed by the *Perry* Court. *Perry* is not a significant change in the law and the COA did not err by so concluding and denying Bigger relief on this claim.

4. The COA did not err by holding that A.R.S. § 13-4234(G) was not unconstitutional.

The State does not believe the COA erred by finding A.R.S. § 13-4234(G) constitutional. The COA harmonized the statute with the Rules of Criminal Procedure honoring the legislative and judicial intent of providing post-conviction relief.

CONCLUSION

The COA did a thorough review of Bigger's claims and reached the correct result. The State takes no position on whether the decision should be depublished.

Respectfully submitted, this 8th day of March, 2021.

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