

2019

**State of Utah, Plaintiff/Appellee, v. Cullen Christopher Carrick,
Defendant/Appellant : Reply Brief**

Utah Court of Appeals

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Scott L. Wiggins, Arnold & Wiggins P.C.; counsel for appellant.

Karen A. Klucznik, Sean D. Reyes, Utah Attorney General's Office; counsel for appellee.

Recommended Citation

Reply Brief, *Utah v. Carrick*, No. 20160249 (Utah Court of Appeals, 2019).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff / Appellee,)	Case No. 20160249-CA
)	
v.)	
)	
CULLEN CHRISTOPHER CARRICK,)	
)	
Defendant / Appellant.)	

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

Pursuant to the Order of the Utah Court of Appeals dated June 18, 2019, to provide supplemental briefing on “the failure to investigate alibi witnesses and to present a timeline” issues on Rule 23B remand

SCOTT L WIGGINS (5820)
ARNOLD & WIGGINS, P.C.
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101
swiggins@awpc.net
Counsel for Appellant

KAREN A. KLUCZNIK (7912)
ASSISTANT SOLICITOR GENERAL
SEAN D. REYES (7969)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
kklucznik@agutah.gov
Counsel for Appellee

ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS**

DEC 12 2019

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Mr. Carrick submits this Supplemental Reply Brief pursuant to the Order of the Court, dated June 18, 2019, addressing “trial counsel’s alleged failure to investigate alibi witnesses and to present a timeline of [Carrick’s] whereabouts during the time of the burglary.” *See* Order, dated June 18, 2019, ¶ 1 (*See* Addendum A to the Supplemental Brief of Appellant).

ARGUMENTS

I. BY FAILING TO ADEQUATELY INVESTIGATE MATT BISHOP AS AN ALIBI WITNESS AND INTRODUCE A SOLID TIMELINE OF MR. CARRICK’S WHEREABOUTS DURING THE BURGLARY, TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

The State contends that Mr. Carrick’s claim fails because he cannot show deficient performance. *See* State’s Second Supplemental Brief of Appellee, p. 12 *et seq.* However, the State’s fails to take into consideration all of the facts and circumstances of this case as this Court is required to do when analyzing an ineffective assistance of counsel claim.

A. Trial Counsel’s Failure to Adequately Investigate Matt Bishop as an Alibi Witness Constituted Deficient Performance in Light of All the Facts and Circumstances of this Case.

According to the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), a defendant must first show that counsel rendered deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment, and second, that counsel’s performance prejudiced the

defendant.¹ *Id.* at 687, 104 S.Ct. at 2064; *see also State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Craft*, 2017 UT App 87, ¶ 16, 397 P.3d 889; *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696. “Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. “The court must then determine whether, *in light of all the circumstances*, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* (emphasis added); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S.Ct. 1029 (2000) (stating “courts must take into account all the information counsel knew or should have known.”) (citing *Strickland*, 466 U.S. at 690 (focusing on the totality of the circumstances)).

Contrary to the State’s argument, all the facts and circumstances of this particular case include the following: that in April 2015 – almost ten months prior to trial – Mr. Carrick provided trial counsel with Matt Bishop’s name as an alibi witness along with Mr. Bishop’s contact information (*See* Finding of Fact No. 12, R. 767-77; *accord* Finding of Fact No. 36, R. 772) (*See* Addendum C to the Supplemental Brief of Appellant); that in the fall of 2015, trial counsel had not yet contacted Mr. Bishop and that trial counsel again asked for Mr. Bishop’s contact information (*See* Finding of Fact No. 13, R. 768); that as

¹The Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

late as a couple of days before trial, Mr. Carrick learned that trial counsel had not yet contacted Mr. Bishop and that he was therefore provided with Mr. Bishop's work information (*See* Finding of Fact No. 14, R. 768; *see also* Finding of Fact No. 16, R. 768-69 and Finding of Fact No. 38, R. 773).

Consistent with the above findings of fact and contrary to the State's assertion that trial counsel did not procrastinate his investigation of Mr. Bishop, the remand court found that Mr. Bishop never met trial counsel prior to trial (*See* Finding of Fact No. 33, R. 772). Rather, Mr. Bishop spoke with trial counsel by phone for "about three minutes" the day before trial (*See id.*). Moreover, the remand court found that Mr. Bishop felt that trial counsel "should have asked him who was at the funeral with him." (*See* Finding of Fact No. 34, 772).

The remand court's findings regarding trial counsel's testimony on remand include the following: that trial counsel had been provided with Mr. Bishop's name as an alibi witness substantially before trial along with his contact information (*See* Finding of Fact No. 49, R. 777). Additionally, the remand court found that it "took a while" for trial counsel to find Mr. Bishop because trial counsel claimed "he was hard to find" – and that trial counsel did not contact Mr. Bishop until "a day or two before trial." (*See id.*).

Trial counsel rendered deficient performance by failing to contact Mr. Bishop until shortly before trial – even though Mr. Bishop was readily available. Mr. Bishop's availability is demonstrated by his being contacted by Mr. Carrick and his sister upon their

learning – just a couple of days before trial – that trial counsel had still not contacted Mr. Bishop in preparation for trial (*See* Finding of Fact No. 38, R. 773 (finding that Mr. Carrick contacted Mr. Bishop through Facebook and requesting that he call trial counsel about the impending jury trial); *see also* Finding of Fact No. 14, R. 768).’

The State claims that because Mr. Carrick gave trial counsel only the following four names of potential alibi witnesses: Tawnie Malmberg; Celeste McCulley; Elias Karras; and Matt Bishop (R. 773:228-29), trial counsel could “reasonably conclude” that these were the “strongest alibi witnesses and that [Mr. Carrick] did not believe any additional alibi witnesses would be necessary.” *See* State’s Second Supplemental Brief of Appellee, p. 13. This argument – however – is inconsistent with trial counsel’s duty to investigate discussed in *Strickland*, where the Court stated that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. This – the Court emphasized – “must be directly assessed for reasonableness in all the circumstances” *Id.*

Trial counsel’s decision not to reasonably investigate alibi witnesses cannot be based simply on the fact that the names were provided by the client. Mr. Carrick provided the names of potential alibi witnesses so that trial counsel could investigate and determine their viability as alibi witnesses, which counsel failed to do. In fact, three of the four potential alibi witnesses, Tawnie Malmberg, Celeste McCulley, and Elias Karras were not true alibi witnesses because they left the funeral services in their own vehicles and thus were not with

Mr. Carrick during arguably the most critical point in time for purposes of providing alibi testimony (*See* R. 595:19-25; R. 595-97; R. 603-04).

Had trial counsel adequately investigated Mr. Bishop as an important alibi witness, he would have learned about Edith Dawson and Cheryl Stoker, the additional alibi witnesses. Both Ms. Dawson, a small business owner, and Ms. Stoker, who serves as a Councilwoman for North Ogden City, would added much-needed credibility to Mr. Carrick's defense as it was presented at trial (*See* Finding of Fact Nos. 17-19 and 21-25).² This is particularly important because trial counsel's defense focused on highlighting Mr. Carrick's alibi. Both Ms. Dawson and Ms. Stoker – based on the evidence presented on remand and the remand court's findings – were with and could account for Mr. Carrick's whereabouts from approximately 3:15 p.m. to 6:45 p.m. on May 21, 2014 (*See* R. 783:139-40; R. 783:60-64; R. 783:76-80; R. 783:109-14; *see also* Findings of Fact Nos. 17-18 and 22-24).

On January 10, 2016, trial counsel filed an Alibi Witness List that did not include either Ms. Dawson or Ms. Stoker as alibi witnesses (*See* R. 783:238-39; R. 72-73; Finding of Fact No. 55). Trial counsel's deficient performance in failing to adequately investigate Mr. Bishop as an important alibi witness is further demonstrated by the fact that by the time

²The State – for example – in its closing argument, contended that “[e]ither [Mr. Carrick] was at the house that day and went in the window looking for something, or he wasn't” because “he was with *his friends from the renaissance faire* and had nothing to do with it.” (R. 642:19-22 (emphasis added)).

trial counsel had contacted Mr. Bishop the day before trial, it was too late to properly notice Ms. Dawson and Ms. Stoker as alibi witnesses in this case (*See* R. 783:253-54).³ As a result, trial counsel rendered deficient performance by failing to contact and speak with Mr. Bishop within a sufficient amount of time in order to reasonably determine how Ms. Dawson and Ms. Stoker could provide alibi witness testimony that was critical to Mr. Carrick's defense in this case.

Perhaps most glaring is the State's failure to effectively rebut the timeline matter. By failing to adequately investigate the alibi witnesses in this case, including Mr. Bishop, trial counsel failed to establish a full timeline of Mr. Carrick's whereabouts and movements before, during, and after the alleged burglary in this case. Trial counsel knew that Mr. Bishop was an important alibi witness in this case (*See* R. 783:259:7-10 (trial counsel testifying that Mr. Bishop was "pretty important" because "he was a driver of a vehicle that [Mr. Carrick] was in")). Nevertheless, trial counsel did not speak with Mr. Bishop until the day before trial and then for only a few minutes by phone (*See* R. 783:115:13-22; R. 783:118:13-17; R. 783:245:17-24).

On remand, Mr. Carrick presented a full timeline detailing his whereabouts and movements before, during, and after the alleged burglary in this case (*See* R. 783:138-55; R. 783:183-85; *see also* Findings of Fact Nos. 40-41 and 45). The investigation and

³*See* Utah Code Ann. § 77-14-2(1) (requiring that a notice of alibi witnesses be filed "not less than 10 days before trial or at such other time as the court may allow").

development of a full timeline included both time and distance calculations of 23 minutes and 15 seconds and 15.7 miles for the trip between Gillies Funeral Chapel and Rack's Barber Shop (*See* R. 783:139:6-9; R. 783:183-85).

The funeral services for April Taylor concluded at 5:04 p.m. (R. 783:15-17). Shortly thereafter, the balloon release in the parking lot of Gillies Funeral Chapel occurred at 5:17 p.m. (R. 783:142:4-15; R. 783:11:11-23). Mr. Carrick and the group of individuals with whom he traveled to the funeral services, namely, Edith Dawson, Cheryl Stoker, and Matt Bishop, remained in the parking lot of Gillies Funeral Chapel socializing until approximately 5:47 p.m. (*See* R. 783:60-64; R. 783:76-80; R. 783:86-96; R. 783:109-14; R. 783:138-44; R. 783:185:10-12).

At approximately 5:47 p.m., Mr. Carrick, Ms. Dawson, Ms. Stoker, and Mr. Bishop left the parking lot in the same vehicles and returned to Rack's Barber Shop (*See* R. 783:62-64; R. 783:77-79; R. 783:114:11-25; R. 783:142:20-23; R. 783:185:10-12). After arriving at Rack's Barber Shop, the group – including Mr. Carrick – entered the barber shop and visited for about 30 minutes about the funeral (*See* R. 783:63-64; R. 783:79:4-15; R. 783:114:22-25; R. 783:142-44; R. 783:185:10-12). When they finished visiting at approximately 6:45 p.m., the group – including Mr. Carrick – split up and left Rack's Barber Shop, with Mr. Carrick turning south onto Hwy 89 towards Ogden (*See* R. 783:79:16-19; R. 783:119:14-21; R. 783:143-44; R. 783:185:10-12).

As shown by the Call-Detail Report, the 911 call of the alleged burglary in this case was made at 6:03 p.m., on May 21, 2014, with the complainant stating that the alleged burglary had concluded 10 minutes earlier (*See* R. 783:144:11-22; R. 783:9-11). Based on the timeline evidence presented at the remand hearing, Mr. Carrick did not have an opportunity to commit the alleged burglary in this case (*See* R. 783:152-53; R. 783:205-06; *see also* Finding of Fact No. 41 (finding that investigator concluded that Mr. Carrick “did not have the opportunity to commit the burglary)).

According to trial counsel’s testimony, “he went over the timeline with [Mr. Carrick]”, discussing things such as “who was there, what [Mr. Carrick] was doing, whose car he was driving in, where they went, and the balloon release after the funeral.” (*See* Finding of Fact No. 51, R. 777). Nevertheless, trial counsel failed to adequately investigate and obtain evidence, such as the Call-Detail Report, which clearly established when the burglary took place – which, in turn was critical to establishing the impossibility of Mr. Carrick having had the opportunity to commit the burglary.

The remand court found that trial counsel testified that if he called too many alibi witnesses, the jury would tune him out” and that the alibi witnesses that he presented “were sufficient.” (*See* Finding of Fact No. 52, R. 777). However, trial counsel’s assertions are inconsistent with the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

Trial counsel's failure to adequately investigate the critical alibi witnesses – in light of the all the facts and circumstances established on remand – was unreasonable.

Trial counsel rendered deficient performance in failing to adequately investigate the alibi witnesses and failing to establish a full-timeline. By failing to duly investigate the alibi witnesses and present evidence of a timeline that established that Mr. Carrick did not have the opportunity to commit the burglary, trial counsel's representation – under all the circumstances of this case – fell below an objective standard of reasonableness.

**B. Trial Counsel's Deficient Performance
Prejudiced Mr. Carrick.**

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068;⁴ *Litherland*, 2000 UT 76 at ¶ 19; *State v. Templin*, 805 P.2d 182, 187 (1990). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986). “[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of

⁴To show prejudice, “a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693.

the accused to receive a fair trial.” See *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

Had trial counsel adequately investigated Mr. Bishop as an alibi witness, he would have located two additional alibi witnesses, namely, Ms. Dawson and Ms. Stoker, who would have provided critical credible alibi testimony that Mr. Carrick did not commit the burglary. The two additional alibi witnesses, in turn, would have provided a much-needed boost to the credibility of Mr. Carrick’s defense as presented at trial. This is critical because trial counsel’s defense focused on highlighting Mr. Carrick’s alibi. Both Ms. Dawson and Ms. Stoker – along with Mr. Bishop – were with and could account for Mr. Carrick’s whereabouts during the most critical points in time when the burglary occurred.

Further, had trial counsel adequately investigated the important alibi witnesses, including the alibi testimony of Mr. Bishop, he would have realized and developed a solid timeline to clearly demonstrate that Mr. Carrick did not have the opportunity to commit the burglary. This would have directly contradicted the evidence presented by the prosecution at trial not to mention establishing the theory of impossibility according to the markers such as the Call-Detail Report. Trial counsel’s errors had a pervasive effect on the inferences to be drawn from the evidence, thus altering the entire evidentiary picture. *Strickland*, 466 U.S. at 695-96.

By way of the evidence presented on remand, Mr. Carrick proffered sufficient evidence to support a reasonable probability that, but for trial counsel’s failure to

adequately investigate Mr. Bishop, as an important alibi witness, the result at trial would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92; and *Templin*, 805 P.2d at 187.

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Such is the case here. The evidence presented on remand together the remand court’s findings of fact demonstrate that trial counsel’s deficient performance more likely than not prejudiced Mr. Carrick’s defense. Moreover – the evidence should cause the Court to reach a definite and firm conviction that a mistake has been made. *See State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

CONCLUSION

In light of the foregoing, Mr. Carrick respectfully requests that this Court reverse his conviction and remand the case for a new jury trial. In addition, Mr. Carrick requests that the Court provide him with any other remedy that the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 9th day of December, 2019.

ARNOLD & WIGGINS, P.C.

/s/ Scott L Wiggins
Scott L Wiggins

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused a true and correct copies of the foregoing **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** to be mailed by electronic mail to the following on this 9th day of December, 2019:

Karen A. Klucznik
Assistant Solicitor General
kklucznik@agutah.gov
Counsel for Appellee

/s/ Scott L Wiggins
Scott L Wiggins

ADDENDA

None.

