



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

### ORDER

Petitioner Carl Staton, through retained counsel, petitions for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. Staton challenges his conviction and sentence entered by the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida.

### PROCEDURAL HISTORY

On May 10, 2002, Staton was charged by an Amended Information with one count of attempted first degree murder and one count of solicitation to commit first degree murder. (Exh 15: Vol. 1: R 14-15).<sup>1</sup> After jury trial on September 24 and 25, 2002, the jury found Staton guilty of attempted first degree murder as charged. (Exh 15: Vol. 1: R 42). The state trial court granted a judgment of acquittal on the solicitation count. Staton was sentenced to thirty years incarceration, with a twenty-five year minimum mandatory term. (Exh 15: Vol. 1: R 45-48).

Staton appealed, raising two issues:

#### Issue I

THE TRIAL COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL HEARSAY ON THE GROUNDS THAT DEFENSE COUNSEL OPENED THE DOOR DURING CROSS EXAMINATION.

#### Issue II

WHETHER FUNDAMENTAL ERROR OCCURRED DURING CLOSING ARGUMENT?

On October 31, 2003, in Case No. 2D02-4381, the state district court of appeal per curiam affirmed Staton's conviction and sentence. (Exhibit 3). Staton v. State, 808 So. 2d 227 (Fla. 2d DCA 2003)[Table]. The mandate issued on January 22, 2004. (Exhibit 4).

On October 21, 2004, through his retained attorney, Bernard Daly, Staton filed a rule 3.850 motion for post-conviction relief, raising three grounds for relief. (Exhibit 5). Staton alleged that trial counsel was ineffective for: (1) opening the door on cross-examination, which allowed the State to introduce prejudicial and otherwise inadmissible hearsay on redirect examination; and (2) failing to object to improper and prejudicial closing arguments of the prosecutor. As his third ground, Staton contended



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

the cumulative effects of counsel's alleged errors caused sufficient prejudice to entitle Staton to a new trial.

On January 7, 2005, the state trial court directed the State to show cause why relief should not be granted. (Exhibit 6). On March 10, 2005, the State filed its response, with record exhibits, arguing Staton was not entitled to relief under the standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). (Exhibit 7). On June 2, 2005, the state trial court summarily denied all three grounds. (Exhibit 8). Staton appealed the denial of rule 3.850 relief. Staton's attorney, Bernard Daley, filed an initial brief on August 23, 2005. (Exhibit 9). Because of the summary nature of the proceeding, the State was not required to file an answer brief and did not do so. (Exhibit 10).

On October 19, 2005, in Case No. 2D05-3379, the state district court of appeal per curiam affirmed the denial of post-conviction relief. (Exhibit 11). *Staton v. State*, 915 So. 2d 1213 (Fla. 2d DCA 2005)(Table). Staton's attorney filed a motion for rehearing and request for the issuance of a written opinion (Exhibit 12), which the state district court of appeal denied on November 23, 2005. (Exhibit 13). The mandate

THE PRESENT PETITION issued on December 9, 2005. (Exhibit 14).

The present timely federal petition was filed by Staton's retained counsel, Stephen P. Tourtelot, on March 9, 2006. (Doc No. 1).

### STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d) and (e) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this court's review of the state court's factual findings must be highly deferential. Such findings are presumed to be correct unless rebutted by clear and convincing evidence. Similarly, the state court's resolution of issues of law -- including constitutional issues -- must be accepted unless the resolutions are found to be "contrary to" clearly established precedent of the Supreme Court of the United States or involve an "unreasonable application" of such precedent. *Williams v. Taylor*, 529 U.S. 362 (2000). It is not enough that the federal courts believe that the state court was wrong; it must be demonstrated that the state court decision was "objectively unreasonable." *Id.* *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002).

### INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

To prevail on a claim of ineffective assistance of counsel, a Petitioner must meet the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland*'s two-part test requires a Petitioner to demonstrate that counsel's performance was deficient and "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (the prejudice component). *Id.* However, if a claim fails to satisfy the prejudice component, the court



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

need not make a ruling on the performance component.

### DISCUSSION

Staton raises two grounds for relief in his petition. A review of the record demonstrates that, for the following reasons, Staton's petition must be DENIED.

#### GROUND ONE

Staton contends that his trial counsel was ineffective because, during his cross-examination of witness Craig Guy, counsel "opened the door" to testimony about a hearsay conversation between Staton and co-defendant Chris Shepard. Guy testified that co-defendant Shepard told him Staton shot the victim. This claim has no merit because Staton cannot establish prejudice under the Strickland test for the reasons stated in the state trial court's order denying rule 3.850 relief. The order reads, in relevant part:

In its Response, the State argues that even if counsel was deficient in opening the door to this evidence, that Defendant cannot show the prejudice prong of the Strickland test. The State argues that since the jury already heard from three separate sources that Defendant shot the victim, Mr. Guy's testimony was cumulative to the other evidence. See *Gudinas v. State*, 816 So. 2d 1095 (Fla. 2002) (no prejudice results where the testimony disclosed as a result of opening the door was cumulative to other testimony). The State indicates first, the hotel clerk testified that the victim told her that "Carl" shot him; secondly, the detective testified that the victim identified Defendant as the shooter;<sup>2</sup> and thirdly, the victim pointed to Defendant during his testimony identifying him as the shooter. See Trial Transcript at p. 48; 102; 192-195, and 205.

The Court notes that although the jury heard from three different sources that Defendant shot the victim, the testimony derived from statements attributed to the victim. Mr. James Hartzell, the victim, testified that on December 27, 2001 around 10:45 p.m., the co-defendant Chris Shepard picked him up and drove to a secluded area and within minutes of arriving that another car pulled up and Defendant got out. He stated that he had a conversation with Defendant about Defendant's debt to him while standing two feet from him and that upon turning to walk back to the [sic] Chris's vehicle, Defendant shot him. See Trial Transcript at pp. 191-192. The victim testified that he actually saw Defendant fire the weapon the third time. See Trial Transcript at p. 193. Defense counsel argued misidentification relying heavily on testimony that indicated that Defendant, although having seen the victim 20 to 25 times in a 4-1/2 to 5 year period, could not positively identify him from a photo-pack immediately after the offense. See Trial Transcript at pp. 183 to 184; 238- 244. The testimony also indicated that police utilizing [sic] in the display a photo dating back from 1997 and that Defendant frequently altered his appearance. See Trial Transcript at pp. 103 & 143-144.

Notwithstanding that testimony that opened the door to Mr. Guy's testimony that co-defendant



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

Chris Shepard told him that Defendant shot the victim, the record indicates that the jury heard from Craig Guy other statements that implicated Defendant's involvement in the botched murder. Craig Guy testified regarding Chris Shepard's worried state during Defendant's multiple visits throughout the night and early morning hours on the night and day after the offense. See Trial Transcript at pp. 146-150. Particularly damaging, Mr. Guy testified that the following morning Defendant visited the residence telling the witness that he needed to find Brandon and "tell Brandon he needed to finish Pops [the victim] off" or that his uncle would spend the rest of his life in jail.<sup>3</sup>

See Trial Transcript at p. 151. Defendant's action in visiting the co-defendant's residence and instruction to Mr. Guy circumstantially demonstrates both his knowledge and involvement in the prior night's shooting as well as his intention to bring about the victim's death. Not only was Defendant tried as the actual shooter, but he was also tried as a principal to the attempted murder. See Trial Transcript, p. 321. A principal is equally guilty of the same offense as the actual shooter if he has the intent that the crime be committed and, by acts or words, assists the other in its commission. See § 777.011, Fla. Stat.; see also *Chaudoin v. State*, 362 So. 2d 398, 401 (Fla. 2d DCA 1978).

Based on Mr. Guy's other statements indicating Defendant as the shooter, someone for [sic] whom he was acquainted and the other circumstances stated above, the Court finds that counsel's error in opening the door to the testimony in question did not undermine the Court's confidence in the verdict. *Orme v. State*, 896 So. 2d 725, 731 (Fla. 2005) ("a reasonable probability is a probability sufficient to undermine confidence in the outcome."). This claim is denied. (Exhibit 8 -- Order Denying Motion for Post-Conviction Relief at pp. 2-4).

The substantive issue of the propriety of admitting the hearsay testimony was raised on direct appeal. There, the State argued the witness's hearsay statement was admissible. Alternatively, the State contended that even if admission of the testimony was error, any such error was harmless. Although the claim is presented in this federal proceeding as one of ineffective assistance of counsel, the same evidence that rendered the evidence harmless at trial also supports the state trial court's conclusion that Staton cannot prove prejudice under Strickland.

At trial, the victim, James Hartzell, testified that he was absolutely sure Staton had shot him. (Exh 15: Vol. 2: T 205, 227). He further testified that he had met Staton on 20 or 25 occasions. (Exh 15: Vol. 2: T 183). Hartzell had loaned Staton money and was expecting to be repaid when he was shot by Staton. Hartzell identified Staton by name and described his vehicle to the detectives. Although there was some confusion regarding the photo pack identification, the confusion is irrelevant since Hartzell positively identified Staton in court and consistently testified that he knew Staton and that Staton was the person who shot him. (Exh 15: Vol. 1: T 102-103, 113-114, 117-118; Vol. 2: T 184, 190, 194-198, 202- 205, 225, 227).

Moreover, Guy testified that Staton told Guy to find "Brandon" and tell "Brandon" to "finish off



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

Pops," the victim. Staton said that he would spend the rest of his life in jail if "Pops" was not "finished off." (Exh 15: Vol. 1: T 151). Katharinn Wagner, who was working as a night clerk at LaQuinta Inn, testified that Hartzell appeared at the door and asked her to call 911. Wagner buzzed in Hartzell and noticed that he was in distress. He was covered in blood, leaves, dirt, and sweat. Hartzell told her he had been shot by a man named "Carl" because Carl owed him money; "Carl" shot at him a couple of times. (Exh 15: Vol. 1: T 46-48, 51).

The admission of Chris Shepard's statement to Guy was not unduly prejudicial because it was cumulative to the testimony of 1) the hotel clerk, who testified that the victim told her that "Carl" shot him; 2) the detective, who testified the victim identified Staton as the shooter; and 3) the victim, who pointed to Staton during the trial and identified Staton as the shooter.<sup>4</sup> Staton fails to establish that the verdict would have been different but for counsel's alleged error in "opening the door" to Guy's testimony regarding Shepard's statement.

The state court's rejection of ground one was neither contrary to *Strickland v. Washington*, nor an unreasonable application of *Strickland* to the facts of Staton's case, and ground one does not warrant habeas relief.

### GROUND TWO

Staton claims trial counsel was ineffective for failing to object to and preserve for appellate review the State's allegedly improper and prejudicial remarks during the State's closing argument. Staton asserts that the comments denigrated Staton, made him appear guilty, and suggested that the defense attorney was obligated to call witnesses. Specifically, Staton complains about the prosecutor's comments describing defense counsel's cross examination of witnesses suggesting that defense counsel would "push, push, push" to get the witness to say something he or she did not want to say. (Exh 15: Vol. 2: 264-265, 266). In addition, Staton takes issue with the following comment of the prosecutor:

You know what else wasn't crossed, wasn't touched, wasn't attacked? That was Franzman when he said yes, yes, it is not uncommon for the victim of violent crime to not remember the details of the person's dress or appearance at the time they were attacked even when the perpetrator is somebody they knew. (Exh 15: Vol. 2: T 268-269). Staton contends this remark criticizes defense counsel for failing to call a witness and misstates the fundamental principal that requires the State to prove each element of a crime beyond a reasonable doubt.

This claim also has no merit. The prosecutor was not suggesting to the jury that the defense had a burden to produce evidence or witnesses; instead, the prosecutor was pointing out the weaknesses in the defense case. In any event, even if any of the comments stated above were improper, Staton cannot establish that his attorney was ineffective for failing to object. The state trial court reasonably determined that the comments were proper, or that Staton was not prejudiced. The state trial court's



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

order reads, in relevant part:

Those excerpts of the State's initial closing argument in controversy appear at pages 264-265, 266, and 268-269 of the trial transcript. In its Response, the State argues that the comments were not improper since the State is permitted to comment on the defense attorney's cross examination of witnesses. Unlike those examples of a prosecutor's improper remarks in *Carabollo v. State*, 762 So. 2d 542 (Fla. 5th DCA 2002) and *Gomez v. State*, 751 So. 2d 630 (Fla. 3d DCA 1999) and the cases referenced in those opinions, the present comments do not rise to the level to constitute an impermissible personal attack on Defendant or his attorney.

Nor can Defendant demonstrate that he was otherwise harmed by the statements. In determining whether the comments were harmful, "the comments must be analyzed within the context of the closing argument as a whole and considered cumulatively within the context of the entire record." *Rivera v. State*, 840 So. 2d 284, 287 (Fla. 5th DCA 2003) (citing *Brooks v. State*, 762 So.2d 879 (Fla. 2000); *Cochran v. State*, 711 So.2d 1159 (Fla. 4th DCA 1998)). In his comments, the prosecutor emphasized the defense attorney's aggressive style and heavy handed demeanor in cross-examining the State's witnesses to push for the answers he was seeking. Counsel countered the prosecutor's "push, push" argument in cross-examination and incorporated this theme in his own argument. See Trial Transcript at pp. 277-286; 297. Counsel told the jury, "Mr. Lewis would say is that I'm up here on cross-examination and I'm push, push, pushing to try to put people into certain position [sic] where they commit to time and things of that nature. Well, that's true." See Trial Transcript at p. 277. Arguing that the cell phone records demonstrate that Defendant could not have been present in the area of the shooting as the victim described and other inconsistencies between the testimony and documentary evidence, counsel explained to the jury the importance of the timeline and his purpose in pressing the witnesses for the times and distances. See Trial Transcript at pp. 278-286.

The State also argues that its comments regarding defense counsel's failure to call a police officer to testify was an invited response to defense counsel's questioning of a hotel clerk and his attempt to try to impeach her with her prior statements to this officer. See Trial Transcript at pp. 52-53. Under the doctrine of 'invited response,' the State is permitted during its own closing argument to comment on an improper argument made by the defense in their closing argument. *Fryer v. State*, 693 So. 2d 1046, 1048 (Fla. 3d DCA 1997); *Rivera* at p. 288. The courts have held that the "invited response" doctrine be narrowly interpreted. *Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000). The record indicates that on direct examination, the State elicited from the hotel clerk that the victim entered the hotel uttering that "Carl" shot him. Defense counsel attempted to impeach the witness with an alleged prior statement that she told an officer that "his friend Carl shot him." Since the State referenced failure to call the witness in its initial closing argument, and not in response to a defense argument, under any narrow interpretation, the comments were not an invited response.

Nonetheless, Defendant cannot demonstrate a reasonable probability that the outcome at trial was affected by this sole improper comment. The variance between the two statements was slight and





## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

consistent with its general meaning that Carl, being friend or otherwise, shot him. Since the comment concerned impeachment of a non-vital witness on a small point and not an element of the crime, this comment was harmless. See *Jackson v. State*, 690 So. 2d 714 (Fla. 4th DCA 1997)(conviction reversed where prosecutor comments suggested a defendant had burden to call witnesses to refute an element of possession of drugs). Any misconception that this comment may [have] led the jury to conclude that the defense had the burden of calling witnesses was corrected by defense counsel's own comments during closing argument. Defendant [sic] counsel explained to the jury later in an unrelated matter that the defense does not have to call witnesses since the State has the burden of proof. See Trial Transcript at p. 288 (lines 6-9). This claim is denied.

(Order Denying Motion for Post-Conviction Relief at pp. 4-5).

Even if any of the comments were improper, the result of the proceeding would not have changed if defense counsel had objected and preserved the issues for review. The comments were not so egregious as to warrant a new trial. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (improper prosecutorial comment not reversible error unless remarks "so infect the trial with unfairness as to make the resulting conviction a denial of due process"); *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (to find prejudice for purposes of ineffective assistance claim, court "must consider the totality of the evidence before the judge or jury").

Trial counsel was not constitutionally ineffective in failing to object to the comments, or failing to move for a mistrial based on the aforementioned remarks by the prosecutor. It would have been futile for counsel to have done so, given the "wide latitude" accorded counsel in making closing arguments, and given that the prosecutor's remarks, read in context, did not constitute an improper comment on Staton's right to remain silent and did not otherwise infringe on Staton's constitutional rights. Florida law affords wide latitude to counsel in closing arguments. See *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). The state trial court's affirmance of the denial of the allegations in ground two did not constitute a decision that was contrary to or an unreasonable application of *Strickland*. Staton is not entitled to habeas relief on ground two.

In his reply to the response, Staton's counsel discusses the AEDPA standard in detail, and alleges that Staton deserves an evidentiary hearing because he diligently sought an evidentiary hearing in state court, but his requests were denied. Because the record conclusively refutes Staton's claim in the present petition, no evidentiary hearing is necessary.

Accordingly, the Court orders:

That Staton's petition is denied, with prejudice. The Clerk is directed to enter judgment against Staton and to close this case.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED



## Staton v. Secretary

2007 | Cited 0 times | M.D. Florida | February 5, 2007

IT IS FURTHER ORDERED that petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). Id. "A [COA] may issue AAA only if the applicant has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2). To make such a showing, petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,' " *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Petitioner has not made the requisite showing in these circumstances.

Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

1. The three-volume record on direct appeal was filed by Respondent as Exhibit 15. References to the documents, pleadings and transcripts found in Volume 1 are designated "R," followed by the page number located in the lower right hand corner of the page. The trial transcript is contained in Volumes 2 and 3, and is referred to as "T," followed by the page number located in the upper right hand corner of the page.
2. It is noted that the police officer conducting the first photopack [sic] identification did not consider the victim's statements while reviewing the photo-pack a positive identification. See Trial Transcript at pp. 238-244. The victim later positively identified Defendant from the photo pack the day before the trial. See Trial Transcript at p. 102.
3. It is also noted that the State presented corroborating testimony from Daniel Trasek, a neighbor of Guy and [sic] co-defendant. He testified to the noise coming from activity emanating from the Guy/Shepard trailer throughout the night and early morning hours on the date of the shooting and Defendant's morning visit at the trailer when Defendant told Guy these statements. See Trial Transcript at pp. 174-177.
4. See Trial Transcript , Exh 15: Vol. 2: T 48; 102; 192-195; and 205.

