IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

**STATE OF FLORIDA**

**Plaintiff,**

**v.** **Case No.: 06-384-G**

**RONALD ROCHER,**

**Defendant.**

---

## ORDER GRANTING IN PART MOTION FOR POSTCONVICTION RELIEF

**THIS MATTER** is before the court on the Defendant's Second Amended Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.850 filed July 6, 2009. Having considered said Motion, all subsequent pleadings, the court files and records, and being otherwise fully advised, this Court finds as follows:

On December 18, 2007, following a jury trial, the Defendant was found guilty of vehicular homicide - failure to give information/render aid (Count I) and leaving the scene of an accident involving death (Count II). This Court adjudicated the Defendant guilty only on Count I and sentenced him to 124.8 months in prison followed by 120 months of probation. His petition for a belated appeal was denied by the First District on November 6, 2008. *Rocher v. State*, 993 So. 2d 522 (Fla. 1st DCA 2008).

On January 16, 2009, the Defendant filed a Motion for Postconviction Relief claiming five grounds of ineffective assistance of counsel and a claim of cumulative error. The Defendant subsequently amended his motion twice. In this instant Second Amended Motion for Postconviction Relief, the Defendant claims (1) trial counsel was ineffective by failing to retain and present an independent accident reconstruction expert at trial; (2) trial counsel was ineffective in failing to object to improper prosecutorial comments during closing arguments and failing to move for a mistrial or request a curative instruction; (3) trial counsel was ineffective in failing to present a consistent theory of defense to the jury; (4) trial counsel was ineffective in failing to retain and present a medical expert at trial; (5) trial counsel was ineffective in failing to present the Lynn Haven Police Chief as a witness at trial, and; (6) cumulative error. In his amended reply, the Defendant added claims of misadvice of counsel to grounds 1 and 4.

On February 25, 2010, this Court denied the Defendant's motion as to grounds two and five and ordered an evidentiary hearing for grounds one, three, four, and six. [1] An evidentiary hearing was held on July 23, 2010, at which the following witnesses testified: Donald Fournier, an accident reconstruction expert; Ronald Rocher, the Defendant, and; Paul Komarek, trial counsel for the Defendant.

---

[1] During the evidentiary hearing, the Defendant waived ground four of the instant motion, thus only grounds one, three, and six were considered during the hearing. (EH-50-54).

## Standard of Proof

To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance was so deficient that it fell "outside of the broad range of competent performance under prevailing professional standards," and (2) that counsel's deficient performance prejudiced him to such an extent that had counsel performed effectively, the outcome of the proceeding would have been different. *Peterka v. State*, 890 So. 2d 219, 228 (Fla. 2004); *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant bears the burden of proof for each prong of the *Strickland* test, and if he is unable to satisfy either prong, then relief should be denied. *See Strickland*, 466 U.S. 668.

The standard for evaluating counsel's performance is that of "reasonable effective counsel." *Miller v. State*, 921 So. 2d 816, 819 (Fla. 5th DCA 2006). Reasonable effective counsel does not mean perfect counsel, but rather is an objective standard. *Id.* There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. "Finally, '[j]udicial scrutiny of counsel's performance must be highly deferential." *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2005) (internal citations omitted).

Further, a Defendant must show, beyond mere speculation, "that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." *Peterka*, 890 So. 2d at 228 (quoting *Strickland*, 466 U.S. at 694). The Court has defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)(stating that to prevail on an ineffectiveness claim, the defendant must demonstrate that counsel's deficiency "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined."). However, the Defendant does not have to prove that "counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. "Instead, [the Defendant must show] that, in light of all the evidence surrounding his conviction, the conduct renders the results of the proceeding unreliable." *Henry v. State*, 948 So. 2d 609, 612 (Fla. 2006).

## Analysis

In ground one, the Defendant alleges his trial counsel was ineffective in failing to retain and call as a witness at trial an independent accident reconstruction expert to rebut Corporal Rick Warden's analysis of the accident and his conclusion that the Defendant was driving recklessly. In support of this claim the Defendant had Donald Fournier, a licensed professional engineer and certified traffic accident reconstructionist, testify regarding his analysis of the accident scene.[2] (EH-10.)

While it is well established that counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected, *see e.g., Henry*, 948 So. 2d at 617, in the instant case, trial counsel's failure to at least consult an expert is evidence of

[2] Mr. Fournier's analysis was based on the same information used by Trooper Warden and on his own independent investigation. (EH-10, 17.)

insufficient consideration of an alternative course of action. Because much of the State's case in proving the Defendant was driving recklessly was based on Trooper Warden's conclusion that the Defendant's vehicle was travelling at a minimum of 89 miles per hour, counsel's failure to consult an expert to review Trooper Warden's conclusions was deficient. The Defendant discussed with counsel both before and during trial the possibility of hiring a reconstructionist, requested counsel hire an expert to analyze Trooper Warden's report, and even provided funds to pay for such an expert. (EH-55-56.) Despite the Defendant's requests, counsel advised the Defendant against hiring an expert and chose not to even consult one. (EH-56, 73.) According to the Defendant, his decision not to hire a reconstructionist was based on Mr. Komarek's advice that doing so would confuse the jury and that "[any expert he hired] would come up with the same evidence the state did." (EH-56.)

Mr. Komarek, the Defendant's trial counsel, testified that he did not hire an expert because he believed it "would not have been able to overcome the problem of the rear-end collision" nor would it negate the fact the Defendant left the scene. (EH-64, 67-68, 75.) However, he acknowledged that if there was evidence that the Defendant was driving the speed limit, "a mere rear-end collision is not necessarily reckless" and in a criminal trial – unlike a civil trial – the defendant is not presumed negligent (let alone reckless) for a rear-end collision. (EH-77.) Tellingly, he agreed that after hearing Mr. Fournier's testimony, it would have made a big difference in his trial strategy and what he would have presented at trial. (EH-73-74.) Despite the significant degree of deference generally given toward trial counsel's strategic decisions, *Strickland*, 466 U.S. at 69, after reviewing the circumstances surrounding counsel's decisions, this Court finds counsel's failure to at the very least consult an accident reconstruction expert was unreasonable and deficient.

As to the second prong of the *Strickland* analysis, this Court finds the Defendant has shown that, in light of all the evidence surrounding his conviction, trial counsel's failure to hire an accident reconstruction expert rendered the result of the trial unreliable, and he therefore suffered prejudice. Because the State cannot prove vehicular homicide without also proving the elements of reckless driving, "the State must necessarily adduce evidence showing conduct at least sufficient to constitute reckless driving, defined as involving a 'willful or wanton disregard for the safety of persons or property.'" *Berube v. State*, 6 So.3d 624, 625 (Fla. 5th DCA 2008) (internal citations omitted). At trial, the State's evidence to prove the Defendant was driving recklessly was based almost exclusively on Trooper Warden's conclusion that the Defendant's vehicle was travelling at least 89 miles per hour (24 miles per hour over the speed limit). The testimony of Mr. Fournier, an experienced accident reconstruct expert, convincingly places nearly all of Trooper Warden's calculations and conclusions in doubt.

According to Mr. Fournier, Trooper Warden, *inter alia*, (1) incorrectly applied the vault equation rather than the trip equation in determining the speed of the victim's SUV (the Mercury) when it went airborne off the railroad tracks[3] (EH-24-26); (2) erroneously used a four-

[3] Mr. Fournier testified that factoring in the amount of energy loss due to the "tripping" caused by the railroad tracks would only change the speed by one or two miles per hour, thus increasing the calculated speed of the Mercury to 41 or 42 miles per hour. (EH-48-49). Also, he stated that even assuming the vault equation was the proper formula to use, Trooper Warden incorrectly applied the formula, which resulted in an inaccurate calculation of the speed of the Mercury. (EH-26, 37).

degree launch angle in the vault equation when the correct launch angle was clearly greater than four degrees[4] (EH-26-28); (3) failed to account for the fact that the Mercury travelled 460 feet from the point it was struck by the Defendant's truck (the Dodge) to the point it hit the railroad tracks, which would have resulted in a loss of speed (EH-31, 37); (4) failed, when evaluating the crush stiffness of the vehicles to determine the closing speed of the Dodge, to recognize that the front of the Dodge went over the top bumper of the Mercury and hit the softer structure of the tailgate (EH-32); and (5) failed to properly account for the weight of each vehicle when doing the crush analysis and energy to determine the closing speed (EH-32-33). Mr. Fournier's testimony showed that both Trooper Warden's calculations and his conclusion that the Defendant's vehicle was travelling at least 89 miles per hour were inconsistent, inaccurate, and "not even close" to being mathematically and physically possible. (EH-28-29, 33-36, 46-47). In support of his conclusions, Mr. Fournier pointed out that if Trooper Warden's calculation that the Mercury was travelling at 89 miles per hour when it landed was correct, then the Mercury would have rolled 585 feet; however, the evidence at the accident scene established that the Mercury only rolled 117 feet, which is consistent with Mr. Fournier's finding that the Mercury launched at 40 miles per hour. (EH-30-31, 37).

In addition to highlighting Trooper Warden's errors, Mr. Fournier explained in great detail how he was able to work backwards from the final resting position of the Mercury to determine that at the time the Dodge impacted the Mercury, the Dodge was travelling at 63 miles per – not 89 miles per hour as Trooper Warden calculated – and the Mercury was travelling at 46 miles per hour, which corresponded with a difference in speed between the two vehicles of 17 miles per hour. (EH-11, 13, 15, 17-23). He further concluded that after impact, the two vehicles achieved a common velocity of 55 miles per hour, which resulted in a post-impact speed of both vehicles of 55 miles per hour rather than the 89 miles per hour calculated by Trooper Warden. (EH-11, 13-22).

As Mr. Fournier's testimony demonstrates, Trooper Warden's testimony and conclusions appear to contain numerous inconsistencies and, if Mr. Fournier is correct, may be completely inaccurate. However, Mr. Komarek's failure to consult or hire a reconstructionist left him completely unable to challenge or refute not just Trooper Warden's testimony but, more importantly, the State's primary evidence the Defendant was driving recklessly. As a result, the reliability of the Defendant's trial was left in doubt. Accordingly, this Court finds counsel's deficient conduct prejudicial.

In ground three, the Defendant alleges his trial counsel was ineffective in failing to present a consistent theory of defense to the jury. Specifically, the Defendant claims that

> [d]uring his opening statement, defense counsel told the jury that [the Defendant] was not driving the Dodge at the time of the accident[.] However, during the trial, the State presented the testimony of [the Defendant's brother] who testified that [the Defendant] admitted to him that he was driving the Dodge at the time of the incident. During his

[4] Mr. Fournier measured the slope of the railroad bed as 30 degrees, but when asked by the Court, he agreed that the photo taken by law enforcement on the day of the accident shows a slope less than 30 degrees. (EH-43) In Mr. Fournier's opinion, the slope on the day of the accident appeared to be "more on the order of 20 degrees," which is the value he included in his calculations. (EH-43-44).

> closing argument, defense counsel admitted [the Defendant] drove the Dodge the night of the incident but, defense counsel argued [the Defendant] was not driving recklessly.

The Defendant claims not only did the State take advantage of this inconsistency but the result of the inconsistency (along with the State highlighting the inconsistency) was that counsel and the Defendant "lost credibility in the eyes of the jury, making it impossible to convince the jury [the Defendant] was not driving recklessly." These claims lack merit.

Mr. Komarek, the Defendant's trial counsel, is a certified criminal attorney with extensive criminal litigation experience. (EH-61.) He testified that it is common for criminal defense attorneys to present multiple theories to the jury, and he acknowledged trials are inherently unpredictable. (EH-68.) According to Mr. Komarek, at trial he focused on the slim evidence that the Defendant was the driver. (EH-64.) The only evidence that the Defendant was driving was the testimony of the Defendant's brother, whom Mr. Komarek believed there was a "reasonable possibility" would not testify at trial because of serious health problems and the medications he was taking. (EH-64-65.) However, even if the Defendant's brother did testify, Mr. Komarek was prepared to discredit his testimony by cross-examining him about medications he was taking that impaired his ability to perceive and remember events. (EH-64-65, 69.) In fact, at trial Mr. Komarek cross-examined the Defendant's brother regarding the side-effects of his medication on his ability to perceive and remember events.

The Defendant characterizes trial counsel's theories as "inconsistent." However, it appears to this Court the theories were in no way "inconsistent" – they were simply alternative theories of defense that were utilized by counsel to adapt to the inherent unpredictability of trial. A defendant is entitled to "reasonable effective counsel" not perfect counsel. *See Miller v. State*, 921 So. 2d 816, 819 (Fla. 5th DCA 2006). The Defendant would have this Court evaluate trial counsel's conduct with the benefit of hindsight, a practice which the Supreme Court in *Strickland* prohibited, and which this Court will not undertake. *See Strickland*, 466 U.S. at 689 ("every effort must be made to eliminate the distorting effects of hindsight . . . ."). Given the inherent unpredictability of a criminal trial combined with the uncertainty at the time of trial whether the Defendant's brother would testify, Mr. Komarek's strategy as it relates to the decision of which theory he chose to pursue was neither deficient nor unreasonable.

In ground six, the Defendant alleges cumulative error. Because this Court finds the Defendant's claims in ground two have merit it is unnecessary to address the Defendant's claim of cumulative error. However, assuming, *arguendo*, neither grounds two nor three have merit, the Defendant's claim of cumulative error must be denied as the Florida Supreme Court has clearly stated, "[W]here the individual claims of error alleged are . . . without merit, the claim of cumulative error also necessarily fails." *Parker v. State*, 904 So.2d 370, 380 (Fla. 2005).

Therefore, it is

**ORDERED AND ADJUDGED** that the Defendant's Second Amended Motion for Postconviction Relief is hereby **GRANTED** as to ground two, and the conviction and sentence in the instant case are hereby vacated. The Department of Corrections shall release the

Defendant and return him to the custody of the Bay County Sheriff for the purposes of retrial. It is further,

**ORDERED AND ADJUDGED** that the Defendant's Second Amended Motion for Postconviction Relief is hereby **DENIED** as to grounds three and six. The Defendant has 30 days from the date of this Order to file a Notice of Appeal with the Clerk of the Circuit Court.

**DONE AND ORDERED** in chambers in ~~Bay County, Florida~~, this 10th day of February 2011.

**HONORABLE MICHAEL C. OVERSTREET,**
**CIRCUIT JUDGE**

**I HEREBY CERTIFY** that a true and exact copy of the foregoing has been provided by U.S. Mail to Attorney for the Defendant, Michael Ufferman, Esq., 2022-1 Raymond Diehl Rd., Tallahassee, FL 32308, the Defendant, Ronald Rocher, DC No. Q20892, Holmes Work Camp, 3182 Thomas Dr., Bonifay, Florida 32425, the Department of Corrections, Bureau of Sentencing, 2601 Blairstone Rd., Tallahassee, FL 32399-2500, and the State Attorney's Office, P.O. Box 1040, Panama City, FL 32402 this 10 day of February 2011.

Robin Owens, Judicial Assistant