

SUPREME COURT OF GEORGIA

Sanders v. State, 283 Ga. 372

659 S.E.2d 376 (2008) · No. S08A0464 · Decided March 31, 2008

SUMMARY

The Supreme Court of Georgia affirmed David Sanders's convictions for malice murder and possession of a knife during the commission of a crime, while vacating the felony-murder conviction and concurrent sentence. The court rejected Sanders's claims of ineffective assistance of counsel, including challenges concerning jury arguments, alleged evidence tampering, and the mutual-combat jury instruction. It also held that his challenge to the sufficiency of the evidence supporting child cruelty was moot because he had been acquitted of those charges.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Benham, Justice
JURISDICTION	Georgia
DECIDED	March 31, 2008
DOCKET	S08A0464
DISPOSITION	other
PROCEDURAL POSTURE	Sanders appealed the denial of his motion for new trial following convictions for malice murder, felony murder, and possession of a knife during the commission of a crime. He challenged the sufficiency of the evidence and alleged ineffective assistance of trial counsel.
STANDARD OF REVIEW	The sufficiency of the evidence is reviewed under whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Ineffective-assistance claims require proof of deficient performance and resulting prejudice, and counsel's conduct is strongly presumed to fall within the broad range of reasonable professional conduct.
PRECEDENTIAL VALUE	Published opinion; precedential Supreme Court of Georgia decision.
PARTIES	David Sanders v. State

TOPICS

- ineffective assistance
- jury instructions
- criminal procedure
- appellate procedure
- evidence

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions for malice murder and possession of a knife during the commission of a crime.
2. Whether the felony-murder conviction and concurrent life sentence could stand alongside the malice-murder conviction.
3. Whether Sanders's challenge to the sufficiency of the evidence supporting a child-cruelty charge was moot after his acquittal on that charge.
4. Whether trial counsel was ineffective for failing to identify an evidentiary discrepancy, investigate alleged evidence tampering, object to the mutual-combat jury instruction, or reserve objections to the jury charge.

HOLDINGS

1. The evidence was sufficient to authorize a rational trier of fact to find Sanders guilty beyond a reasonable doubt of malice murder and possession of a knife during the commission of a crime.
2. A defendant may be sentenced on either a malice-murder or felony-murder guilty verdict arising from a single homicide, but not both; the felony-murder conviction and its concurrent life sentence therefore had to be vacated by operation of law.
3. The challenge to the sufficiency of the evidence supporting the child-cruelty charge was moot because Sanders had been acquitted of that charge.
4. The ineffective-assistance claims failed because Sanders made no affirmative showing that counsel's challenged decisions were not conscious and deliberate trial strategy, particularly where trial counsel did not testify at the motion-for-new-trial hearing.
5. The evidence-tampering ineffective-assistance claim failed because the alleged tampering rested on speculation and Sanders could not show a reasonable probability of a different outcome.
6. Counsel's failure to reserve objections to the jury charge did not constitute ineffective assistance because the mutual-combat charge was not objectionable under the circumstances and the charge benefited Sanders by authorizing a voluntary-manslaughter verdict.

KEY QUOTATIONS

"To prevail on a claim of ineffective assistance of trial counsel, appellant "must show counsel's performance was deficient and that the deficient performance prejudiced him to the point that a reasonable probability exists that, but for counsel's errors, the outcome of the trial would have been different." (659 S.E.2d at 379)

"A charge on mutual combat "is warranted only when the combatants are armed with deadly weapons and mutually agree to fight."" (659 S.E.2d at 379-380)

FACTUAL BACKGROUND

Sanders and his wife became involved in a heated argument at their home. The wife's daughter saw Sanders straddling the victim and making punching motions, and the victim died from stab wounds that punctured her liver and lung; a bloody serrated knife was found in the apartment. Sanders testified that the victim lunged at him with a butcher knife, that they struggled over it, and that he stabbed her after she lost consciousness.

PROCEDURAL HISTORY

A Cobb County grand jury indicted Sanders in 2003. Following trial in September 2003, the jury found him guilty of malice murder, felony murder, and possession of a knife during the commission of a crime; the trial court imposed concurrent life sentences for the murder convictions and a consecutive five-year sentence for the weapon conviction. The trial court denied Sanders's amended motion for new trial in January 2007, and the Supreme Court of Georgia affirmed in part and vacated in part.

DISPOSITION

other

CASES CITED

- Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)
- Malcolm v. State, 263 Ga. 369(4), 434 S.E.2d 479 (1993)
- Willingham v. State, 279 Ga. 886(3), 622 S.E.2d 343 (2005)
- Mack v. State, 283 Ga. App. 172, 173 n.10, 641 S.E.2d 194 (2007)
- Pruitt v. State, 282 Ga. 30(4), 644 S.E.2d 837 (2007)
- Cherry v. State, 283 Ga. App. 700(1a), 642 S.E.2d 369 (2007)
- Nichols v. State, 281 Ga. 483(2a), 640 S.E.2d 40 (2007)
- Archie v. State, 248 Ga. App. 56(2), 545 S.E.2d 179 (2001)
- McDaniel v. State, 279 Ga. 801(2c), 621 S.E.2d 424 (2005)
- Tillman v. Massey, 281 Ga. 291(1), 637 S.E.2d 720 (2006)
- Hudson v. State, 280 Ga. 123(2), 623 S.E.2d 497 (2005)
- Carreker v. State, 273 Ga. 371(2), 541 S.E.2d 364 (2001)
- Sinkfield v. State, 266 Ga. 726(2), 470 S.E.2d 649 (1996)
- Hall v. State, 273 Ga. App. 203(3), 614 S.E.2d 844 (2005)
- Fleming v. State, 273 Ga. 837(2), 546 S.E.2d 273 (2001)
- Moses v. State, 270 Ga. 127(6), 508 S.E.2d 661 (1998)
- Holcomb v. State, 268 Ga. 100(6), 485 S.E.2d 192 (1997)

OPINION

BENHAM, J.

659 S.E.2d 376 (2008) SANDERS v. STATE. No. S08A0464. Supreme Court of Georgia. March 31, 2008. *378 Sidney Lee Storesund, Marietta, for appellant. Thurbert E. Baker, Attorney

General, Reggie Allen Lampkin, Assistant Attorney General, Patrick H. Head, District Attorney, John Richard Edwards, Grady A. Moore, Dana J. Norman, Assistant District Attorneys, for appellee.

BENHAM, Justice. Appellant David Sanders was convicted of malice murder, felony murder, and possession of a knife during the commission of a crime in connection with the homicide of his wife, Sheila Newton, who died as a result of multiple stab wounds.[1] Sanders contends on appeal he was denied his right to effective assistance of counsel and asserts the evidence was not sufficient to authorize a conviction of cruelty to a child in the first degree.

1. The State presented evidence that appellant and the victim became involved in a heated verbal argument in their home. The victim's teen-aged daughter was awakened by her mother running into her room and screaming to her to call the police.

The daughter saw her mother fall and lay on the floor on her back, and saw appellant straddle the victim, bend over her, and make punching motions at her. A police officer who responded to the emergency call for assistance found the deceased victim on the floor of the daughter's bedroom, and blood in several rooms of the apartment. A bloody serrated knife was found in the master bedroom.

Appellant had lacerations on his arms, legs, and hands that required sutures. A forensic investigator testified appellant's hand wound could have been an offensive or a defensive wound, and the victim's palm wounds were more commonly seen as defensive wounds.

The forensic pathologist who performed the autopsy on the victim testified she died as a result of stab wounds that punctured her liver and one of her lungs. Appellant testified the victim lunged at him with a butcher knife and the two "tussled" for possession of the knife. He stated the victim lost consciousness and fell to the floor, whereupon appellant gained possession of the knife and stabbed the victim in the stomach.

Appellant testified he had used a butcher knife, not the bloody serrated knife *379 found in the apartment, and asserted that someone else had inflicted the stab wound that had punctured the victim's lung. Also admitted was evidence of a prior difficulty between appellant and the victim in Colorado in November 2001, which resulted in appellant's arrest for threats of violence against the victim.

The evidence was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of malice murder and possession of a knife during the commission of a crime. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

However, while a single homicide can result from facts that support guilty verdicts on counts charging both malice and felony murder, a defendant may be sentenced on either guilty verdict,

but not both. *Malcolm v. State*, 263 Ga. 369(4), 434 S.E.2d 479 (1993). Inasmuch as appellant's felony murder conviction was vacated by operation of law upon entry of the sentence for malice murder (*id.*), appellant's conviction for felony murder and the concurrent sentence of life imprisonment imposed for that conviction must be vacated.

Willingham v. State, 279 Ga. 886(3), 622 S.E.2d 343 (2005). Lastly, appellant's contention to the contrary notwithstanding, his acquittal of the child cruelty charge renders moot his challenge to the sufficiency of the evidence concerning that charge. *Mack v. State*, 283 Ga.App. 172, 173, n. 10, 641 S.E.2d 194 (2007). 2. Appellant maintains trial counsel did not render effective assistance of counsel when he failed to point out to the jury a purported discrepancy in the evidence, when he failed to investigate alleged evidence tampering, and when he failed to object to the inclusion of a charge on mutual combat in the jury instructions or reserve objections to the instructions.

Trial counsel did not testify at the hearing on the motion for new trial. To prevail on a claim of ineffective assistance of trial counsel, appellant "must show counsel's performance was deficient and that the deficient performance prejudiced him to the point that a reasonable probability exists that, but for counsel's errors, the outcome of the trial would have been different.

A strong presumption exists that counsel's conduct falls within the broad range of professional conduct." *Pruitt v. State*, 282 Ga. 30(4), 644 S.E.2d 837 (2007). (a) The decision whether to object to a particular jury charge is a matter of trial strategy (*Cherry v. State*, 283 Ga.App. 700(1a), 642 S.E.2d 369 (2007)), as is the decision concerning what evidence to present or forego in defending a client charged with a crime.

Nichols v. State, 281 Ga. 483(2a), 640 S.E.2d 40 (2007). Without trial counsel's testimony, there is no evidence in the record as to why counsel did not object to the jury charge and why counsel failed to make the jury aware of the purported discrepancy in the evidence.

As appellant "made no affirmative showing that the purported deficiencies in his trial counsel's representation were indicative of ineffectiveness and were not examples of conscious and deliberate trial strategy," these allegations of ineffective assistance of counsel were properly rejected by the trial court. *Archie v. State*, 248 Ga.App. 56(2), 545 S.E.2d 179 (2001) (where trial counsel did not testify at hearing on motion for new trial alleging ineffective assistance of counsel). (b) Appellant's assertion of evidence tampering centers on his testimony that the bloody serrated knife found at the scene was not the butcher knife he purportedly took from the victim and used to stab her.

His contention rests on mere speculation and, even if deficient performance is assumed, his claim of ineffective assistance fails because appellant cannot prove there is a reasonable probability that the trial would have ended differently, given his admission he stabbed his unconscious wife in the stomach. See *McDaniel v. State*, 279 Ga. 801(2c), 621 S.E.2d 424 (2005). (c) Appellant contends

trial counsel performed deficiently by failing to reserve his objections to the content of the trial court's charge to the jury and, in so doing, forfeited appellant's ability to raise on appeal the propriety of the inclusion of a charge on mutual combat.

"To constitute deficient performance, counsel's action or inaction must fall below an objective standard of reasonableness. [Cit.]. By failing to reserve the right *380 to raise objections to the jury charge at a later time, counsel waived appellant's right to raise objections concerning the jury instructions on motion for new trial or on appeal. [Cit.]. Trial counsel's failure to reserve objections to the jury charge falls below an objective standard of reasonableness and therefore constitutes deficient performance only if the charge is objectionable.

[Cits.]." *Tillman v. Massey*, 281 Ga. 291(1), 637 S.E.2d 720 (2006). A charge on mutual combat "is warranted only when the combatants are armed with deadly weapons and mutually agree to fight." *Hudson v. State*, 280 Ga. 123(2), 623 S.E.2d 497 (2005) (charge not warranted when there was no evidence the victim, who had been fighting with the defendant, was armed when the defendant shot the victim).

If there is any evidence from which the jury could have found that both parties intended to resolve their differences by fighting each other with deadly weapons, there is no error in giving a charge on mutual combat. *Carreker v. State*, 273 Ga. 371(2), 541 S.E.2d 364 (2001) (both victim and the defendant were armed, one with a rifle and one with a handgun, and there was evidence each fired at the other).

Because the mutual combat charge authorizes a jury to find the defendant guilty of voluntary manslaughter in lieu of murder, it is a charge that benefits a defendant and, as such, a convicted defendant's complaint that it was improper to give the charge is without merit. *Sinkfield v. State*, 266 Ga. 726(2), 470 S.E.2d 649 (1996); *Hall v. State*, 273 Ga.App. 203(3), 614 S.E.2d 844 (2005).

Accordingly, trial counsel's failure to reserve objections did not constitute deficient performance (*Tillman v. Massey*, supra, 281 Ga. 291, 637 S.E.2d 720), and appellant's assertion of ineffective assistance of counsel was properly denied by the trial court.[2] Judgment affirmed in part and vacated in part. All the Justices concur. NOTES [1] The victim was killed on November 29, 2002, and appellant was arrested shortly thereafter.

On April 17, 2003, the Cobb County grand jury returned a true bill of indictment charging appellant with malice murder, felony murder (aggravated assault being the predicate felony), aggravated assault, cruelty to children in the first degree, two counts of cruelty to children in the second degree, and possession of a knife during the commission of a crime.

Appellant's trial commenced on September 22, 2003, and concluded two days later with the jury's return of guilty verdicts on the counts charging malice murder, felony murder aggravated assault, and possession of a knife during the commission of a crime.

The trial court directed a verdict on one of the child cruelty counts and the jury acquitted appellant of the two remaining child cruelty charges. Appellant was sentenced to concurrent sentences of life imprisonment for the malice murder and felony murder convictions, and a consecutive five-year term of years for the weapon conviction. Appellant filed a timely motion for new trial on September 30, 2003, and amended it on January 10, 2007.

The trial court denied the motion for new trial on January 16, 2007, and a timely notice of appeal was filed on February 21, 2007. The appeal was docketed in this Court on September 17, 2007, and was orally argued on February 12, 2008.

[2] While we conclude there was no error, we question whether a charge on mutual combat should have been given in light of the discovery of one bloody knife and appellant's testimony that only the victim was armed and he had taken the knife from her before stabbing her with it. See *Fleming v. State*, 273 Ga. 837(2), 546 S.E.2d 273 (2001) (no evidence the defendant and the victim were engaged in a mutual fight with deadly weapons where the defendant struck the victim and took the victim's gun from the victim's waistband and shot the victim); *Moses v. State*, 270 Ga. 127(6), 508 S.E.2d 661 (1998) (charge on mutual combat not warranted since there was no evidence that the victim and the defendant were both armed with deadly weapons and mutually intended or agreed to fight); *Holcomb v. State*, 268 Ga. 100(6), 485 S.E.2d 192 (1997) (mutual combat charge not warranted where the victim and the defendant struggled over a gun during which the victim was shot).

While there was testimony of knives hidden in the frame of the bed shared by appellant and the victim, there was no testimony that those knives were used in this incident. A history of violent aggressive behavior between a defendant and a victim can give rise to an inference of mutual intent to fight that will support a charge on mutual combat if both were armed at the time of the homicide.

Sinkfield v. State, *supra*, 266 Ga. 726(2), 470 S.E.2d 649.