

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

SEP 13 2000

JAMES W. PATTERSON  
CLERK

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**ERNEST L. WALKER, JR.,**

**Appellant,**

**v.**

**THE STATE OF OKLAHOMA,**

**Appellee.**

**NOT FOR PUBLICATION**

**Case No. F-99-442**

**SUMMARY OPINION**

**LUMPKIN, VICE-PRESIDING JUDGE:**

Appellant, Ernest Walker, was tried by jury in the District Court of Tulsa County, Case No. CF-98-3316, and convicted of: Burglary in the First Degree in violation of 21 O.S. 1991, § 1431, after conviction of two or more felonies, (count one) and Violation of a Victim Protection Order in violation of 22 O.S.Supp.1996, § 60.6 (count two). The jury recommended a sentence of sixty (60) years imprisonment for count one and one (1) year for count two. The trial judge sentenced Appellant accordingly. Appellant now appeals his convictions and sentences.

Appellant raises one proposition of error in this appeal: that defense counsel's failure to advocate his client's cause resulted in appellant being deprived of a fair trial and effective assistance of counsel. After a thorough consideration of this proposition and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined Appellant's claim has merit.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984), the United States Supreme Court established a two prong test for evaluating ineffective assistance of counsel claims. First, Appellant must show

counsel's performance fell below an objective standard of reasonableness and, second, the deficient performance must have prejudiced the defendant by resulting in an unreliable or fundamentally unfair outcome of the proceeding.

In determining whether counsel's conduct was outside the wide range of professionally competent assistance, we consider whether counsel fulfilled the function of making the adversarial testing process work. *Phillips v. State*, 989 P.2d 1017, 1048-49 (Okla. Cr. 1999) Adversarial testing is the bedrock of our criminal justice system. *Washington v. State*, 989 P.2d 960, 980 (Okla. Cr. 1999); *Malicoat v. State*, 992 P.2d 383, 405 (Okla. Cr. 2000). The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984), quoting *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. *Cronin*, 466 U.S. at 656, 104 S.Ct. at 2045. In such instances, the trial process loses its character as a confrontation between adversaries, and the constitutional guarantee of the Sixth Amendment is violated. *Id.*, 466 U.S. at 656-57, 104 S.Ct. at 2045-46.

Here, although the evidence admitted against Appellant at trial was quite strong, there were several valid issues to explore, from Appellant's point of view. The performance by Appellant's trial counsel was wholly deficient and prejudicial to Appellant. At preliminary hearing trial counsel seemed confused and what questions he did ask of the State witness went more to help the

State's case than to assist his client. At trial: Trial counsel provided no discovery or list of witnesses to the State; Seemed confused and had difficulty asking coherent questions of both jurors on voir dire and witnesses on cross examination; When the State requested to present the preliminary hearing testimony of the victim due to the fact she had avoided service of summons to testify, trial counsel did not object or contest her unavailability; After the State read the victim's testimony from the preliminary hearing, trial counsel declined to have any of the cross-examination read into the record even though the cross had revealed the landlord had unilaterally taken Appellant off of the lease to the house he had leased with the victim and he had discussed with the victim about coming to get his weight bench from the house; Trial counsel first reserved opening statement, then waived it, and called no witnesses in defense; and he failed to contest whether Appellant was aware of the continuous protective order or if at the time of the incident he was still a co-lessee of the house where he was alleged to have committed burglary. Under this record, trial counsel's performance cannot be said to have provided meaningful adversarial testing.

### **DECISION**

The judgments and sentences are hereby **REVERSED** and this matter is **REMANDED** to the District Court of Tulsa County for a new trial.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE J. JESSE S. HARRIS, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, V.P.J.**  
STRUBHAR, P.J.: CONCUR  
JOHNSON, J.: CONCUR  
CHAPEL, J.: CONCUR  
LILE, J.: CONCUR

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