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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000054

Theodore Wills Jr.,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR REHEARING

On July 20, 2022, this Court affirmed the PCR Court’s denial of post-conviction relief in the above-captioned case upon holding the PCR Court properly determined Trial Counsel was not deficient because he had articulated a valid reason for advising Petitioner to enter the proffer agreement. Because this Court’s holding misapprehends the genuine issues in this case and overlooks critical facts and points of law pivotal to determination of the issues that were raised for review, Petitioner must respectfully petition for rehearing pursuant to Rules 221(a) and 240, SCACR.

I.

Although the PCR Court did not make an express finding that Trial Counsel was not deficient because he had articulated valid reasons for advising Petitioner to enter the proffer agreement (App. pp. 445-46), the PCR Court found “no deficiency on the part of Counsel in his advice to Applicant to enter into the agreement, nor prejudice therefrom” in light of Trial Counsel’s opinion¹ at the time that the agreement was advantageous to Petitioner and his belief that Petitioner had been truthful with him. (App. pp. 445-46). Neither reason is valid to preclude a finding of ineffectiveness.

First, the record makes clear that Trial Counsel only believed that the agreement was advantageous to Petitioner at the time because his understanding of the agreement’s terms was simply wrong. Trial Counsel testified he understood the agreement as providing that Petitioner’s statement could not be used against him (App. p. 382, lines 2-5; p. 387, lines 11-12). Trial Counsel stated he was surprised, even angry that the State was using Petitioner’s statements as evidence of his guilt in its case in chief at trial and felt that the State had actually breached the agreement by doing so. (App. p. 382, lines 2-5; p. 379, line 23—p. 380, line 1; p. 378, In. 23-25, p. 379, In. 1-4.). In addition to his PCR hearing testimony, Trial Counsel’s arguments at trial to exclude the statement also make it abundantly clear he failed to recognize that the text of the agreement effectively waived the protections of Rule 410, SCRE. (App. p. 51, line 12-15; p. 51, line 25—p. 52; p. 125, line 6-17; p. 127, line 8 p. 131, line 3-10;p. 135 pp. 297-298). Trial

¹ This opinion was shared by both Solicitor Hixson and Petitioner at the time. However, Petitioner’s opinion was based upon Trial Counsel’s misinterpretation in regard to the use of his statements in the event of breach, as well as the benefits he would be entitled to upon compliance with its terms. Moreover, Solicitor Hixson’s view on the advantageousness of the agreement and surprise that Petitioner had failed the polygraph is not probative on the issues at hand. *See Love v. State*, 428 S.C. 231, 242-43, 834 S.E.2d 196, 202 (2019).

Counsel had vigorously argued, among other points, that the agreement was vague in that it failed to specifically state that Petitioner's statements would be admitted against him in the State's case in chief at trial in the event of breach. (App. p. 51, line 12-15; p. 51, line 25—p. 52, line 3). In Trial Counsel's view, the agreement rather only permitted the State to use Petitioner's statements for the purpose of decision-making for the disposition of the case and in the plea negotiation process. (App. p. 131, lines 3-10; p. 298). In his view, to "allow the State to expand beyond the scope of the literal language contained in the agreement" and admit the statements as evidence of Petitioner's guilt was inherently unfair and in violation of due process. Notably, Trial Counsel also informed the trial judge that entering into an agreement that permitted admissibility of his statements for this purpose was "not a voluntary, knowing, or intelligent decision that either of us made with respect to entering into the agreement." (App. p. 125, lines 18-20). As thoroughly discussed in Petitioner's Brief, Trial Counsel's interpretation of the agreement directly conflict with its express terms.

Next, Trial Counsel's belief that the agreement was advantageous was also based upon his erroneous interpretation of the agreement's benefits to Petitioner. Trial Counsel explained his understanding of the agreement's benefits at several points on both direct and cross-examination at the PCR hearing as: that in return for Petitioner's truthfulness and compliance with the terms, the agreement would "get him out and basically, the case would end"; "all of the charges would be dropped" or "be handled in a way that would set him free." (App. p. 378, line 4-6; p. 389, ln. 17-22; p. 390, ln. 1-18). Trial Counsel also believed that Petitioner would not be prosecuted on additional charges related to the murder of Julian Lee. (App. 378, lines 23-25; p. 379, lines 1-4). As provided in Petitioner's Brief, the express terms of the agreement directly conflict with Trial Counsel's interpretation.

Thus, because Trial Counsel's belief that the agreement was advantageous was based upon his objectively unreasonable and erroneous interpretation of the agreement, his belief is not a valid reason to excuse his ineffective performance. An attorney's ignorance or misinterpretation of contract principles cannot form the basis of a sound strategy and an attorney's failure to contemplate or lack of knowledge as to a critical fact or point of law cannot provide the basis for a sound or reasonable strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 383, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Foye v. State* 335 S.C. 586, 518 S.E.2d 265 (1999). Further demonstrative of this point is to frame Trial Counsel's performance and decision-making in this case in the hypothetical setting of a guilty plea in which counsel's erroneous understanding of the State's plea offer and misadvice to his client to accept it resulted in a much harsher sentence than counsel had advised, as well as rendered the client's plea as involuntarily, unknowingly, or intelligently entered. In South Carolina cases addressing this scenario, counsel's misinformed, erroneous belief that the plea offer was advantageous to his client would not be deemed as a valid reason for advising his client to accept the plea offer nor would it preclude a finding of ineffectiveness. *See e.g. Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1987).

Additionally, Trial Counsel's belief that Petitioner had been truthful with him when discussing the shooting and the extent of his involvement cannot excuse a finding of deficiency as a valid reason for advising Petitioner to enter the agreement. Trial Counsel testified: "I knew [Petitioner's] family and had known him for a long time, cousins and related people, and I felt like he would've been truthful with me and would've been comfortable in opening up about it, so I felt comfortable that he was telling me the truth and to go ahead and move forward with this strategy or this approach." (App. p. 389, lines 11-16). The basis Trial Counsel provided for his

belief on Petitioner's truthfulness is unsound because it is not based in investigation or reasoned professional judgement but is rather founded upon an emotional attachment or social familiarity and sheer blind faith that Petitioner was truthful with him. Indeed, Trial Counsel had acknowledged that there was no independent evidence provided by the State to corroborate Petitioner's account and likewise no way for him determine the veracity of his account prior to the State's polygraph. (App. p. 381, lines 4-10; p. 384, lines 19-20). At the time Trial Counsel advised Petitioner to enter the agreement, he was aware that the terms dictated that a polygraph was rather the only mechanism to determine the veracity of Petitioner's account. (App. p. 381, lines 4-10; p. 384, lines 19-20; p. 398, line 22—p. 399, line 13). Yet, his testimony and trial arguments demonstrate that he was also generally aware from his experience as a criminal defense attorney of the unreliability of polygraph examinations and potential for erroneous results, even commenting that "there is no truth serum." Trial Counsel proceeded upon his unsupported belief of Petitioner's truthfulness despite the fact that under the terms of the agreement, the State's opinion Petitioner had been untruthful, and thus in breach, could be based on any deviation, or "indication of deception" or indication of attempted deception. (App. p. 398, line 22—p. 399, line 13). In light of the foregoing, Trial Counsel's belief as to Petitioner's truthfulness is not a valid reason to excuse his ineffective performance.

II.

Additionally, in affirming the PCR Court's decision, this Court also noted that the courts of this State had yet to specifically opine on the validity of Rule 410 waivers at the time this case was decided.

However, this is not determinative because criminal defendants have always been permitted to waive their rights and evidence rules in agreements in the State. Likewise, the state and the defendant have always had the freedom stipulate to certain evidentiary matters, to draft agreements with relatively little oversight *See Hill v. State*, 350 S.C. 465, 470-71, 567 S.E.2d 847, 850-51, (2002) (holding that the rule in *Gilmore* is inapplicable and will not excuse counsel's deficiency where counsel need not have anticipated a change in the law); *Chappell v. State* (Ct. App. 2019)(concluding counsel is not excused from being found ineffective where the issue was not a novel issue of law and is rather an application of an existing rule to a new set of facts); *Thompson v. State*, --- S.E.2d ----2018 WL 1404480, No. 27785 (Mar. 31, 2018) (affirming PCR Court's findings that trial counsel was deficient for failing to object to improper vouching of a CSC victim's credibility because counsel was on notice this was improper even though the case law on this issue was in relatively early stages of development at the time of trial).

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The undersigned hereby certifies that the Petition for Reharing filed in the above-captioned case were served upon Counsel of Record for the Respondent, this day August 4, 2022

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