STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Allendale County

Honorable Diane Schafer Goodstein, Circuit Court Judge
Honorable Perry M. Buckner, Circuit Court Judge

DEREK MANER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000230

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to testimony from an officer that, fifteen months after the disappearance of Ericka Bradley, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open when there was no link between the brother's car and the disappearance, making the testimony irrelevant?

2. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to testimony about purported hidden jewelry when there was no connection between the jewelry and the disappearance of Ericka Bradley, making the testimony irrelevant?

STATEMENT

In August of 2008, the Allendale County Grand Jury indicted Petitioner, Derek Maner, for murder, indictment #2008-GS-03-0135. On February 9, 2009, Petitioner proceeded to jury trial before the Honorable Michael G. Nettles. Byron E. Gipson represented Petitioner at trial. T. DeWayne Pearson and Natalie R. Armstrong prosecuted the case. The jury found Petitioner guilty and Judge Nettles sentenced Petitioner to life in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Maner, 2012-UP-550 (S.C.Ct.App. filed October 10, 2012). (App. pp. 838-839).

On September 12, 2013, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on August 20, 2014. On June 9, 2017, an evidentiary hearing was held before the Honorable Diane Schafer Goodstein. Deborah J. Butcher represented Petitioner at the PCR hearing. Ruston W. Neely represented the State. In a written order filed October 11, 2017, Judge Goodstein denied relief and dismissed the application. The notice of intent to appeal was not filed.

On August 27, 2018, Petitioner filed a second PCR application. The State consented to the grant of a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. p. 975). In an order signed by the Honorable Perry M. Buckner, III, on January 15, 2019, Judge Buckner granted the belated appeal. This petition for writ of certiorari pursuant to Austin and a separately filed petition for writ of certiorari follow.

ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for not objecting to testimony from an officer that, fifteen months after the disappearance of Ericka Bradley, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open when there was no link between the brother's car and the disappearance, making the testimony irrelevant.**

On November 6, 2006, Ericka Bradley disappeared. Her body was never found. Bradley is the mother of Petitioner's son. In November of 2006, Bradley and the infant son were staying with Petitioner and his family. (App. p. 672, lines 9-18). Petitioner was 18 years of age. (App. p. 672, lines 19-20). On the evening of November 6, 2006, Bradley questioned Petitioner about whether he was seeing another female, Maggie Aldrich. (App. pp. 675-679). Bradley's cousin, Peter Tony Cooper, testified that Bradley took a bat out of the trunk of Petitioner's car and swung the bat at Petitioner, but Petitioner blocked the swing. (App. p. 112, lines 1-7). Cooper testified that he put the bat back in the trunk while Petitioner and Bradley talked. (App. p. 112, lines 6-15). Eventually Cooper left Bradley and Petitioner because Bradley told Cooper that she was all right and he could leave. (App. p. 112, line 17 – p. 113, line 1). Petitioner testified that after he calmed Bradley she got in the car and they were on their way home when she got agitated again. (App. p. 677, lines 16-24). Petitioner testified, "And, you know, she looked at me after the second time she said, fine. Let me out. I'll walk. So you know, I said okay. All right. And then she threw my car in park and she didn't jump out. The car stopped and then she got out." (App. p. 679, line 22 – p. 680, line 1). Petitioner left her and called her cousin Cooper to go pick her up. (App. p. 681, line 24 – p. 682, line 1).

Cooper confirmed that Petitioner called him and asked him to go look for Bradley because she would not get back in the car with Petitioner. (App. p. 113, lines 5-13). Cooper

looked for his cousin but was unable to find her. (App. p. 113, line 14 – p. 114, 115, lines 1-12). Bradley was not seen again.

Officers executed a search warrant of Petitioner's car and processed the car for evidence. (App. p. 447, line 10 – 448, lines 1-22). SLED Agent Jennifer Clayton testified that a DNA sample from two spots underneath Petitioner's car were, "consistent with that of a female offspring of Jackie Bradley and Henry Bradley." (App. p. 503, line 25 – p. 504, lines 1-2). Robert M. Bennett testified as an expert in forensic science and DNA. (App. p. 644, line 25 – p. 645, lines 1-15). Bennett testified that he studied the underbody of appellant's car and stated he did not see a blood spatter that was of the quantity or the location "where I would expect to see if a human was drug underneath a car." (App. p. 653, lines 19-20).

On January 12, 2008, fifteen months after the disappearance of Bradley, Officer James Hutto with the Allendale Police Department stopped an individual, who the officer testified was Petitioner's brother[1], for a tag violation. (App. p. 354, lines 14-19; p. 324, line 19 – p. 325, 326, lines 1-25). During trial the prosecutor asked Officer Hutto about Petitioner's brother's car. (App. pp. 324 – 331). The officer testified that the car was missing a backseat and the trunk would not open. (App. p . 327, line 17 – p. 328, lines 1-8; p. 354, lines 7-13). The officer never sought a search warrant for the car and the car was never processed. (App. p. 355, lines 2-7). The officer testified that three days prior to the court date for the tag violation, the car was sold for recycling and crushed. (App. p. 329, lines 7-19). Trial counsel objected to the officer's hearsay testimony. (App. p. 327, line 4; p. 328, lines 17-25). Trial counsel also objected as irrelevant to testimony with regard to what happened in court with regard to the tag violation and testimony about the car being sold for recycling and crushed three days before the court date for

[1] The officer was later recalled and testified that the individual was Petitioner's brother, George Hayes Elmore, Jr. (App. p. 378, line 23 – p. 379, lines 1-11).

the tag violation. (App. p. 328, lines 15-16; p. 360, line 20 – p. 361, lines 1-15). Trial counsel, however, did not object to the testimony about the missing backseat and inability to search the trunk.

Petitioner was arrested in April of 2008, seventeen months after the disappearance of Bradley. (App. p. 603, line 20 – p. 604, lines 1-18). At the time of his arrest Petitioner was a student at Benedict College studying mathematics and computer science. (App. p. 670, lines 2-13). At sentencing the judge was told that Petitioner had no history of criminal issues. (App. p. 830, lines 2-3).

During the PCR hearing PCR counsel questioned trial counsel about the failure to object to testimony by Officer Hutto about Petitioner's brother's car. (App. pp. 883-892). In the order of dismissal the PCR judge wrote:

> The State presented Hutto's testimony concerning his personal experiences and observations. The State used that circumstantial evidence to present a factual theory of how the victim's body was disposed to the jury. Tr. 420-421, Vol. III. This Court finds the evidence was relevant and proper for the jury's consideration. Counsel properly argued the jury should give it very little weight and consideration. This Court finds any objection by Counsel would have been overruled. Therefore, this Court finds Counsel was not deficient for failing to object.

(App. p. 957). The PCR judge additionally found that Petitioner failed to prove prejudice. (App. p. 957). The PCR judge erred. Trial counsel was ineffective for not objecting to testimony from Officer Hutto that fifteen months after the disappearance of Ericka Bradley, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open. The testimony was irrelevant because there was no link between the brother's car and the disappearance. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The testimony about the condition of Petitioner's brother's car fifteen months after the disappearance of Bradley was irrelevant and trial counsel was ineffective for failing to object to the testimony. In State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Preslar, 364 S.C. at 476, 613 S.E.2d at 386 (citing In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794); accord State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct.App.2002). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004); see also Rule 403, SCRE.

The officer's testimony about the condition of Petitioner's brother's car fifteen months after the disappearance of Bradley did not make more or less probable the matter in controversy. The testimony was not relevant as a theory of how Bradley's body was disposed when there is no evidence linking Petitioner or Bradley to the brother's car. There was no evidence that the body was disposed as the body was never found. Trial counsel was deficient for failing to object to the irrelevant testimony. Petitioner was prejudiced by trial counsel's deficient performance. The State relied on the testimony in closing argument. (App. p. 783, line 6 – p. 784, lines 1-4). The State's evidence was not overwhelming. There is a reasonable probability that, if counsel had objected to the testimony, the outcome of the proceeding would have been different.

2. The PCR judge erred in refusing to find trial counsel ineffective for not objecting to testimony about purported hidden jewelry when there was no connection between the jewelry and the disappearance of Ericka Bradley, making the testimony irrelevant.

When Petitioner was arrested in April of 2008, seventeen months after the disappearance of Ericka Bradley, he was a student at Benedict college and dating another Benedict student, Madoree Pipkins. (App. p. 601, line 15 – p. 602, lines 1-11). Pipkins testified that while Petitioner was in jail awaiting trial he called her and told her that he bought some jewelry from an incarcerated individual who she later learned was Dawan Doe. (App. p. 618, line 18-p. 619, lines 1-6). Petitioner told her that the jewelry was in a flower pot at a brown building on Lake Warren. (App. p. 606, line 16 – p. 607, lines 1-10). Pipkins testified that Petitioner told her to wipe the jewelry off, take it home with her and not tell anyone where it came from. (App. p. 610, lines 15-19). Pipkins testified that she and Petitioner's brother Donald looked for the jewelry but were unable to find it. (App. p. 608, line 10 – p. 609, lines 1-4).

During the PCR hearing PCR counsel asked trial counsel about the failure to object to the jewelry testimony. (App. pp. 869 – 876). PCR counsel specifically questioned trial counsel about any connection between this purported jewelry and Ericka Bradley. (App. p. 870, lines 7-9; p. 872, lines 6-12). Trial counsel testified, "I think strategically, based on the other information that I had and learned through the investigation of the case over a period of a year plus that I didn't think that was something I needed to object to." (App. p. 875, lines 9-13). The State failed to link the jewelry another inmate sold[2] to Petitioner, sight unseen, with Ericka Bradley. The State failed to establish that at the time of her disappearance Bradley was even wearing any jewelry. The State only had a photograph of Bradley wearing jewelry. (App. p. 870, lines 10-14). No jewelry was ever found. (App. p. 871, lines 24-25).

In the order of dismissal the PCR judge wrote, "This Court finds the State's presentation of the jewelry as circumstantial evidence was not more prejudicial than probative under a Rule 403 analysis." The PCR judge additionally found that Petitioner failed to prove prejudice. (App. p. 962). The PCR judge erred. Trial counsel was ineffective for failing to object to the jewelry testimony. The State failed to prove that there was ever any jewelry hidden in a flower pot on Lake Warren. The State failed to present evidence that the jewelry request, made over seventeen months after the disappearance of Bradley, had any connection to Bradley.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the

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[2] Petitioner testified that the alleged jewelry was in exchange for Petitioner allowing another inmate to purchase food items on Petitioner's jail commissary account. (App. p. 690, line 6 – p. 691, lines 1-25).

applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The testimony about the jewelry was irrelevant and trial counsel was ineffective for failing to object to the testimony. Again, as discussed above, in State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

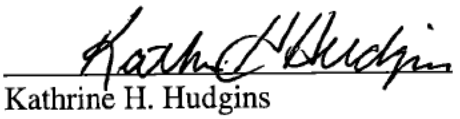
> Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Preslar, 364 S.C. at 476, 613 S.E.2d at 386 (citing In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794); accord State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct.App.2002). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004); see also Rule 403, SCRE.

The testimony about the jewelry did not make more or less probable the matter in controversy. Pipkin's testimony about the jewelry was irrelevant because the State failed to show a connection between the purported jewelry and Bradley. Trial counsel was deficient for failing to object to the irrelevant testimony. There was no valid strategic reason for failing to

object to the testimony. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). Petitioner was prejudiced by the deficient performance. The State relied on the testimony in closing argument. (App. p. 787, lines 8-25). There is a reasonable probability that, if counsel had objected to the testimony, the outcome of the proceeding would have been different.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Allendale County

Honorable Diane Schafer Goodstein, Circuit Court Judge
Honorable Perry M. Buckner, Circuit Court Judge

DEREK MANER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix have been served on Derek Maner, #333244, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of October, 2019.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 23rd day of October, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029