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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No. 2020-001265

William H. Seals, Jr., Circuit Court Judge

Marcus Dwain Wright, ... Appellant,

v.

State of South Carolina, ... Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Is the PCR court's decision contrary to the Fifth Amendment and in direct conflict with the analysis and holding in State v. Rivera, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013)?

STATEMENT OF THE CASE

The Appellant, Marcus Dwain Wright, was indicted for Murder, Trafficking Powder Cocaine, Possession with Intent to Distribute Cocaine Base, Possession of a Weapon During a Violent Crime. A jury trial was held in Horry County on June 17-21, 2013, the Honorable John C. Hayes presiding. The Appellant was represented by L. Morgan Martin and Edward M. Brown. The State was represented by Donna E. Elder, Assistant Solicitor for the Fifteenth Judicial Circuit. The jury returned a verdict of guilty on all charges. The Appellant was sentenced to life on the murder, five years on the weapons charge, twenty-five years on the trafficking charge, and fifteen years for the possession with intent to distribute cocaine base. All sentences were run concurrent to each other and consecutive to the life sentence. Appellant timely filed notice of appeal. On appeal this Court affirmed the Appellant's convictions and sentences in State v. Marcus Dwain Wright, Opinion No. 5401, filed April 27, 2016. The Appellant timely filed an action for post conviction relief. A hearing was held on December 14, 2018, the Hon. ___ presiding. Beattie Ashmore represented Appellant at the PCR hearing. Johnny Ellis James of the South Carolina Attorney General's Office represented the State. From that hearing an order was entered denying Appellant relief. Appellant filed a motion to alter or amend judgment from which the circuit court entered an order denying relief in part and granting relief in part. Based on that ruling the court then issued the AMENDED ORDER OF DISMISSAL on which this appeal is based. J. Falkner Wilkes represents Appellant on appeal. Chelsey F. Marto, of the South Carolina Attorney General's Office represents the Respondent, State of South Carolina.

ARGUMENT

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (*citing* Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d [**840] at 527 (*citing* Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

I. THE DECISION OF THE PCR COURT IS CONTRARY TO THE FIFTH AMENDMENT AND IN DIRECT CONFLICT WITH THE ANALYSIS AND HOLDING IN STATE V. RIVERA, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013).

Prior to the defense putting up its case in the Appellant's trial the court advised the Appellant of his Fifth Amendment rights. With the *proviso* that he was not bound by his decision the court inquired as to whether or not the Appellant had decided to testify. The Appellant responded that he would exercise his right to remain silent. The defense case proceeded and after failing to introduce the testimony of a single witness the defense rested without consulting with the Appellant. After brief discussions about charges, and without any ruling, court concluded for the day. Prior to the trial resuming on the following morning the Appellant advised trial counsel that he wanted to testify. Apparently unfamiliar with the relevant law, and despite the trial court's earlier *proviso*, trial counsel informed the Appellant that it was too late for him to testify. Counsel failed to inform the court prior to the trial resuming that the Appellant wanted to testify on his own behalf. When the trial resumed counsel still failed to inform the court that the

Appellant wanted to testify. Instead of moving immediately to reopen the defense case counsel proceeded to continue the discussions about jury charges. This led to a ruling denying the defense requests to charge manslaughter and self-defense. When the defense indicated that it was ready to proceed with closing arguments the Appellant interrupted and asked to speak. Knowing what the Appellant wanted to say defense counsel informed the court that Appellant had changed his mind overnight and wanted to testify. The court denied the Appellant the right to testify stating that counsel should have brought the issue to the court's attention first thing in the morning prior to the court's ruling on the requests to charge.

Despite the record being clear that counsels' misunderstanding of the law and failure to act timely led to the denial of the Appellant's right to testify, the PCR court found no deficiency on the part of trial counsel under the first prong of its *Strickland* analysis. Then, in its application of *Strickland's* second prong the PCR court applied a harmless error analysis despite our Supreme Court having clearly held that the issue "is not amenable to harmless-error analysis and is reversible without a particularized prejudice inquiry." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

Relevant Facts from the Criminal Trial

After the State rested its case in the Appellant's trial defense counsel made motions for directed verdicts on all charges. (A. p. 1044). The motions were denied and the court's ruling was followed by a discussion of the Appellant's potential impeachment offenses. (A. p. 1046). The court then advised the Appellant as to his basic rights, including his right to testify or remain silent. Immediately after advising the Appellant of his rights the court inquired as to whether or not at that point the defendant thought he would testify: "And I ask you now -- *you're not bound*

at this point, but have you determined whether you wish to testify or exercise your right to remain silent?" The Appellant responded "Exercise my right to remain silent." (A. p. 1048, l. 10-12). The case proceeded with the defense calling Christopher McCray as a witness. McCray was presented *in camera* to first determine the admissibility of his testimony. (A. p. 1051). The court ruled McCray's testimony inadmissible and immediately after its ruling the court inquired whether the defense had any additional witnesses. Without conferring with the Appellant trial counsel immediately responded: "We have no further witnesses." (A. p. 1067, l. 13-15). Then, still without a break, the jury was brought back in and the defense rested on the record. (A. pp. 1067-1068). The jury was then released for the day. (A. p. 1069). After the jury had been released the prosecutor initiated a discussion about potential jury charges. (A. p. 1069). No rulings were made and court concluded for the day with the trial judge indicating that the discussions would continue the following morning. (A. p. 1078).

Prior to the trial resuming the following morning the Appellant informed defense counsel Brown that he wanted to testify. Brown immediately informed his co-counsel Martin. (A. pp. 227-228; 1083-1084). Prior to the trial resuming neither Brown nor Martin immediately informed the court that the Appellant wanted to testify. (A. pp. 1078-1079). When the trial did resume neither Brown nor Martin informed the court that the Appellant had changed his mind and wanted to testify. (A. pp. 1078-1079). Instead, when the trial resumed and the case turned over to the defense, trial counsel engaged in lengthy discussions about requests to charge. (A. pp. 1078-1082). After those discussions the court entered a ruling denying the defense's requests to charge self-defense and manslaughter. (A. pp. 1082-1083). Still neither Brown nor Martin alerted the court that the Appellant had informed them that he wanted to testify. When asked if the defense

was ready to proceed with closing arguments Martin replied "Yes". (A. p. 1083, l. 14). At that point the Appellant interrupted and asked permission to speak. (A. p. 1083, ll. 17-18). Martin, knowing what Wright wanted to say, finally informed that court that Wright wanted to testify:

> Mr. Martin: "Judge, let me say for the record our client has come out this morning and tells me that he's changed his mind and he wants to testify. I have informed him that in my opinion that matter has passed us by as based on his assertion to the Court that he wished to remain silent. We have rested, but out of an abundance of precaution for the record, I don't want to cut him off, and I'll tell the Court that is what he wants to address with the Court." (A. pp. 1083, l. 12 - 1084, l. 4).

The trial court immediately responded: "No. The record is closed." (A. p. 1084, ll. 7-8).

A review of the record of the court's comments immediately following its ruling shows that the court initially based its ruling on the mistaken belief that the Appellant had only decided to testify after hearing the court's ruling on the requests to charge: "Now that he has seen how the Court has ruled, he wants to adjust his strategy, I guess. I don't know what he wants to do, quite frankly, but it would appear that the desire now to testify is the result of rulings by the Court." (A. p. 1084, ll. 8-12). Martin reminded the court that when it asked Appellant whether he would testify that it specifically told him that he was not bound by that decision. (A. p. 1084, ll. 16-18). The discussion then focused on the timing of the Appellant's decision to testify:

> The Court: Did he indicate to you, Mr. Brown, prior to coming in here that he wished to testify?
>
> Mr. Brown: He indicated -- I went back to see him, and Mr. Wright did indicate that he wanted to testify, and ---.
>
> The Court: All right. *And why wasn't that called to the Court's attention before the Court ruled*?
>
> Mr. Brown: Well, Your Honor, no, that was this morning, not ---.

> The Court: I know, but I just ruled on the two voluntary manslaughter and self-defense, just a few minutes ago, and he did not, when he came in here, neither he , nor you, nor Mr. Martin made any -- any -- any overture to the Court that he wanted to change his mind and testify. *That would have been the time, before the Court ruled.*

(A. p. 1086, l. 17 - p. 1087, l. 8).

Even after being informed that the Appellant's decision to testify had been made prior to the trial resuming, the trial court restated its belief that the Appellant had waited until the court had made a ruling on the charges before he decided to testify. (A. p. 1087). This time Martin spoke up and was unequivocal: "Well, Judge, let me say this. That is not how it happened." (A. p. 1087, ll. 16-17). Martin went on to explain exactly what happened and how he had informed the Appellant early that morning before the trial resumed that it was too late for him to testify.

> Mr. Martin: For the clarity of the record, when he came out -- Mr. Brown came out, said he wants to testify. The when he came out, we sat here and talked and I told him that time had passed him by, that we had rested based on his assertion that he didn't want to testify, and I -- I didn't bring it up before we got into the motion, so for whatever difference that makes, he did not wait until you ruled to so say anything about that. He said that prior to that.

(A. p. 1087, ll. 17-24). Despite it being clear that the Appellant had not waited until after the Court's ruling before deciding to testify, the trial court again denied the Appellant the right to testify, now citing *counsel's failure* to inform the court prior to the court's ruling on the requested jury charges: "Well, it wasn't called to the Court's attention until that point [after the court's ruling on charges]. So I'm not going to allow him to testify. The record is closed." (A. p. 1087, l. 25 - p. 1088, l. 4).

A. The PCR Court Erred in Failing to Find Trial Counsel's Performance Deficient.

"[T]he right of an accused to testify in his defense is fundamental to the trial process and

transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 n.8. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

In the Appellant's case a timely motion to reopen the defense to allow the Appellant to testify would have been granted. The court's comments make that clear. The only basis stated for denying the Appellant's request to testify was that the court had already ruled on the jury charge requests. The court specifically cited counsel's failure to alert the court as soon as the case resumed that morning stating "that would have been the time, before the Court ruled." Martin specifically stated to the trial court, not once but twice, that at the time the Appellant informed them that he had changed his mind and wanted to testify Martin believed that it was too late and therefore took no action to inform the court. Counsel's inaction was clearly driven by a misunderstanding of the applicable law. Had counsel understood the applicable law they would have known that a motion to reopen would not only have been timely, but overwhelmingly supported by law if the motion had been made immediately upon the trial resumed that morning.

First, counsel failed to appreciate the fundamental nature of the right at issue. "A criminal defendant has a right to testify on his or her own behalf." Rock v. Arkansas, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is rooted in the Fourteenth Amendment due process right, the Sixth Amendment Compulsory Process Clause, and the Fifth Amendment's guarantee against compelled testimony. *Id*. at 51-53. This Court has recognized the importance of a defendant's testimony in his or her own case: "Where the very point of a trial is to determine

whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." State v. Rivera, 402 S.C. 225, 244, 741 S.E.2d 694, 704 (2013) *quoting* United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985).

Second, counsel should have considered whether the denial of the request would serve any purpose or its granting pose any prejudice to the State. "Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.*, at 295. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711 (1987). At the point that counsel was informed by the Appellant that he wanted to testify counsel should have realized that denying the motion would serve no legitimate interests and allowing it would pose no prejudice to the State. Given the fundamental nature of the right to testify defense counsel should have known that a motion to reopen would have been granted if made immediately upon trial resuming that morning. Clearly counsel failed to conduct a proper analysis of the issue and as a result failed to immediately inform the court that the Appellant wanted to testify. Instead counsel misinformed the Appellant that it was too late to make the request because the defense had rested.[1] Counsel clearly did not understand the law applicable. "An attorney's ignorance of a

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[1]To the extent that Martin's PCR testimony may imply, contrary to his representations to the trial judge, that his inaction was based on Wright's having "reconciled himself" that testifying was not in his best interests, any alleged decision by the Appellant, or impression that Appellant may have given Martin at that point, would have been tainted by Martin's incorrect advice that it was already "too late" for Appellant to testify.

point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

Given that counsel's decision not to timely move to reopen was based on an obvious misunderstanding of the law, it can not in any way constitute a valid strategic decision. "No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. *See* Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (*Pleicones, J., dissenting*) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved")." Abney v. State, 408 S.C. 41, 55-56, 757 S.E.2d 544, 551-52 (Ct. App. 2014) *Justice Few dissenting.*

In Rivera this Court emphasized the importance of a defendant's right to testify in his own behalf:

> The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("[F]undamental to a personal defense . . . is an accused's right to present his own version of the events in his own words." (emphasis added)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53 (*quoting* Harris v. New York, 401 U.S. 222, 230, 91 S. Ct. 643, 28 [*242] L. Ed. 2d 1 (1971)). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Id.* at 51. "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* (*quoting* Faretta v. California, 422 U.S. 806, 819 *n.*15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id.* at 52 (*citing* Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled

> testimony." *Id.* "'The choice of whether to testify in one's own defense . . . is an exercise of [that] constitutional privilege.'" *Id.* at 53 (*quoting* Harris, 401 U.S. at 230) (*omission in original*). "'A person's right . . . to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; . . . .'" Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (*quoting* In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (*emphasis omitted*)).

State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013).

In Rivera the trial judge relied on Rule 403, SCRE in excluding Rivera's testimony. Although it is unclear what particular rule was relied on by the trial court in the Appellant's case, the analysis should be the same. "Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote . . . ." *Id.*" State v. Rivera, 402 S.C. 225, 245, 741 S.E.2d 694, 704-05 (2013) (*quoting* Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (2006). Although Rivera did not specifically involve a motion to reopen the case to allow the defendant to testify, this Court in Rivera cited United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) in support of its analysis. Walker dealt directly with the denial of a motion to reopen to allow a defendant to testify and reversed based on the same analysis applied by this Court in Rivera. As in the Appellant's case, the motion to reopen in Walker was made after the defense rested but before closing arguments or jury instructions. In its analysis the court in Walker noted that reopening the case for Walker to testify posed no prejudice to the prosecution's case:

> "The . . . testimony [sought to be admitted through the motion to reopen] would not have carried a distorted importance merely by being introduced after a reopening. First of all, since neither closing arguments nor jury instructions had yet been delivered, the . . . testimony would have been heard in the orderly flow, with perhaps an intervening continuance, of the defense testimony. But even assuming that the testimony might have derived undue emphasis from its appearance subsequent to all parties resting, a cautionary instruction by the trial judge might have remedied that potential problem. 596 F.2d at 779."

United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985).

Applying Walker in the Appellant's case shows that a motion prior to the court's ruling on jury charges would not have distorted the importance of the Appellant's testimony. The Appellant's testimony would have been heard by the jury in the orderly flow and the court could have given an instruction for the jury not to put any importance on the fact that the defense reopened its case to offer the Appellant's testimony. Counsel should have been aware that an immediate motion to reopen would have met every criteria to be granted. As a result of trial counsel's clear misunderstanding of the law he informed Appellant that it was too late for him to testify and failed to make a motion to reopen. But for the failure of counsel to understand the applicable law and timely raise the issue the Appellant would have been allowed the opportunity to testify. Trial counsel clearly failed to effectively protect the Appellant's right to testify. The PCR court therefore erred in finding no deficiency in counsel's performance under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

B. The PCR Court Erred in Applying Harmless Error Review Where Appellant Was Denied the Right to Testify.

Despite having found no deficiency on the part of trial counsel the PCR court went on to conduct a prejudice analysis under the second prong of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In doing so the PCR court applied a harmless-error analysis to the denial of the Appellant's right to testify on his own behalf: "As to prejudice, first, the Court finds that even if Counsels had immediately confronted the trial court with Applicant's new found desire to testify, *there is not a reasonable probability the outcome would have been different.*" (A. p. 27). The PCR court's application of a harmless error analysis is in direct conflict with our Supreme

Court's holding in Rivera and therefore constitutes an error of law. In Rivera the Court explicitly held that the improper refusal to permit a defendant to testify in his own defense is a structural error that requires reversal without a particularized prejudice inquiry: "The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis. We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry." (*citations omitted*)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

Here the PCR court clearly applied a harmless-error analysis to the denial of Applicant's right to testify. Based on its own determination of the Applicant's credibility the PCR court found that the outcome of the criminal trial would not have changed even had the Applicant been allowed to testify. This is the precisely the analysis prohibited in Rivera and federal cases:

> "In sum, we are persuaded that the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 *n.8*. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)."

State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013). The PCR court's application of a harmless error analysis in Appellant's case therefore constitutes an error of law.

Conclusion

Based on the foregoing this Court should reverse the decision of the PCR court and remand the case for a new trial.

Respectfully submitted,

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