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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Donald B. Hocker, Plea Judge
The Honorable William P. Keesley, Sentencing Judge
The Honorable Brooks P. Goldsmith, Post-conviction Relief Judge

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Case No.: 2020-000013

Destiny H. Mills,

Petitioner.

vs.

State of South Carolina,

Respondent,

PETITIONER'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the post-conviction relief court err in denying Petitioner relief when her defense attorneys provided ineffective representation by failing to move to suppress the State's blood-alcohol evidence after the vial containing a blood sample for Petitioner to have independently tested was destroyed by a law enforcement officer, thus preventing her from asserting her statutory right to conduct her own investigation?

II. Did the post-conviction relief court err in denying Petitioner relief when her public defender provided ineffective representation by not informing her of her Fifth Amendment right to remain silent when she informed him that she was involved in dram shop litigation related to the accident from which her charge arose?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. During its December 2015 term, the Lexington County Grand Jury indicted Petitioner for felony driving under the influence resulting in death (2015-GS-32-02929). The case was prosecuted by Assistant Solicitor Todd Wagoner, Esquire. Initially, Petitioner was represented by David Mauldin of the Lexington County Public Defender's Office (referred to herein by name to avoid confusion with Mr. Williams). Mr. Mauldin represented Petitioner for approximately one year from her arrest. App. p. 133, lines 1-5. Petitioner ultimately retained private counsel, Robert T. ("Theo") Williams, Sr., Esquire (referred to as "Mr. Williams" or "Plea Counsel"). On November 2, 2017, Petitioner appeared before the Honorable Donald B. Hocker and pleaded guilty as indicted. Judge Hocker accepted Petitioner's plea and deferred sentencing. Thereafter, on November 16, 2017, Petitioner appeared before the Honorable William P. Keesley for sentencing. Judge Keesley sentenced Petitioner to a term of imprisonment of ten (10) years. Petitioner did not appeal her plea or sentence.

A post-conviction relief action was filed on May 11, 2018. A hearing was held on June 28, 2019 before the Honorable Brooks P. Goldsmith. Due to an issue that arose at the evidentiary hearing, a subsequent hearing was held on September 9, 2019. At the conclusion of this hearing, the Court agreed to accept a written closing on behalf of each party. An Order of Dismissal was filed November 26, 2019. This appeal follows.

STATEMENT OF FACTS

Petitioner filed a post-conviction relief application on May 11, 2018 initially alleging that Plea Counsel was ineffective for the following reasons: Involuntary guilty plea by misleading and ineffective assistance of counsel for lack of research. App. p.56.

Petitioner subsequently amended to include:

1. Ineffective Assistance of Counsel in that:

    a. Failure to move for dismissal and/or suppression of blood alcohol evidence as a result of Law Enforcement's failure to comply with requirements that a Defendant is entitled to a private testing of any blood evidence.
    b. Failure to suppress video evidence.
    c. Failure to move Pre-trial to suppress any and all statements made by the Petitioner.
    d. Failure of Defense Counsel to advise the Petitioner that she should assert her Constitutional right not to incriminate herself in a civil disposition conducted by Attorney Rick Hall.
    e. Failure of Defense Counsel to attend the civil disposition on behalf of the Applicant.
    f. Failure to adequately advise the Petitioner regarding her rights at trial.
    g. Failure to properly advise the Petitioner about her guilty plea. More specifically that she would only receive five (5) years if she plead guilty or even the possibility of house/arrest.
    h. That the Applicant was mistakenly advised that if she assisted in the civil case that she would be assisted in the criminal case. That the Applicant mistakenly believed that this would result in the receipt of less or no active prison sentence.
    i. That Defense Counsel did not adequately consult with the Petitioner regarding her case, the evidence the State had against her and any theory of Defense.
    j. That the Applicant believes that all plea offers were not conveyed to her.

Petitioner was charged with the crime of felony driving under the influence resulting in death on September 1, 2015. At approximately two o'clock in the morning, Joseph Mozingo was driving Olivia Johnson's 1996 Jeep Cherokee. App. p. 6. Ms. Johnson had just picked up Mr. Mozingo from work, and the two were going to Waffle House, travelling eastbound on Interstate 26 just before the mile marker 113. App. p.6.

As Mr. Mozingo was travelling in the far-right lane, he noticed headlights coming up behind him at a high rate of speed. App. p. 6. The approaching vehicle was a grey Kia Soul, driven by Petitioner. App. p.7. As Petitioner hit Mr. Mozingo's vehicle, Ms. Johnson, who had undone her seatbelt, was ejected from the vehicle. App. p.6-7.

When law enforcement arrived on scene, Applicant made a statement that she had consumed one beer earlier that evening. App. p. 7-8. Law enforcement detected an odor of alcohol from Petitioner and stated that her speech was slurred. App. p.8. Petitioner's friend, James Bonner, who had also been with her earlier that evening, arrived on scene and informed law enforcement the two had been at Wild Wings and the British Bulldog Pub that evening. App. p. 7-8.

Petitioner was transported to the hospital by Law Enforcement where a blood alcohol content sample was taken from Petitioner. The sample revealed she had a BAC of 0.127. App. p.8. Petitioner then admitted she consumed several beers that evening. App. p. 9. She further stated that her passenger was distracting her as she was driving him home. App. p.9.

TESIMONY PROVIDED AT POST-CONVICTION RELIEF HEARING

Petitioner, Destiny Mills

Petitioner testified at the post-conviction relief hearing that she was taking a friend home. She stated that, as she was driving, her friend kept trying to kiss her, causing her to loss control of the vehicle. App. p. 79, line 25 - p. 80, lines 1-2. She testified that she was at the scene of the accident for about an hour and then she was taken to the hospital by the police officer. App. p. 81, lines 11-19. Petitioner testified that a blood draw was performed at the hospital at approximately 4:45 a.m. She further stated that when she was arrested at the hospital, she was given her Miranda[1] rights and that she understood these rights.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Petitioner testified that she made several statements at the scene and, at the hospital, she was notified that her blood alcohol level was .127. App. p. 83, lines 1-25. Petitioner further testified that there was a video from the hospital, but she was never shown the video. She testified that she believed that she would have appeared sober in that video. App. P. 84, line 16 – p.87, line 13.

Petitioner was assigned a public defender in October 2015. App. p. 85, lines 2-7. She testified that she spent approximately six months in the Lexington County detention center until she made bond. She was on bond approximately six months when she retained Private Counsel. App. p. 85, lines 10-22. Petitioner testified that she felt that the representation by the public defender (David Mauldin) was inadequate and that she was concerned by the high caseload of her attorney. She ultimately hired Theo Williams, Esquire in October 2016. App. p. 86, lines 17-23.

Petitioner testified that she was also involved in a civil lawsuit brought by the family of the deceased. During the time that she was represented by the Public Defender's Office, Petitioner was served with a subpoena to appear for deposition. She testified that her understanding of the document she received was that she had to cooperate and, if she did not show up, a warrant would be issued for her arrest. App. p. 87, lines 1-25. She further testified that she discussed this matter with Mr. Mauldin, her Public Defender, and he told her that he would not be present at the deposition: "He told me he wouldn't be there. He wasn't getting paid for civil suits or anything." App. p.88, lines 3-5. Petitioner testified that Mr. Mauldin indicated that they (meaning the Plaintiffs in the civil suit, the decedent's family) might be willing to help her situation. App. p.88, lines 4-10.

Petitioner ultimately had to hire a civil attorney. She hired Wesley Waites to go with her to the deposition. App. p. 88, lines 1-10. Petitioner testified she discussed this matter with Mr.

Mauldin and he never explained to her that she should not participate in the deposition or that she should exert her Constitutional, Fifth Amendment right to remain silent. App. p. 88, lines 3 – p.89, line 8; p.89, line 22 – p.90, line 14. Mr. Waites only represented her on the civil cause of action.

Petitioner further testified that she did not know that this deposition could possibly be used against her. She understood that by helping the victim's family (Plaintiffs in their civil dram shop litigation), they would also in turn help her. She further stated that she believed the deposition was ultimately used against her because the Solicitor got a copy of it. App. p.89, lines 9-21. A copy was sent to Petitioner from the solicitor, rather than from Plaintiffs' attorney/deposing counsel, Rick Hall, approximately three (3) weeks before she was supposed to go to trial. App. p.89, lines 12-16.

In the same vein, Mr. Hall, as attorney for the victim's family in their civil matter, made a statement at Petitioner's sentencing hearing. Mr. Hall stated at the sentencing hearing that this case was one of the worst traffic cases that he had ever seen in thirty-five years of practicing law. He further stated that the 911 call is one of the most horrific things that he had ever heard, and the automobiles were virtually destroyed. He alleged Petitioner had been out binge drinking with the purpose of getting drunk, all of which warranted a significant jail sentence. App. p. 10, line 6 - p.11, line 17. Again, Petitioner was never told that she had the right to exercise her Fifth Amendment rights. App. p. 89, lines 1-24.

Petitioner testified that she believed she was not guilty of felony DUI. App. p. 99, lines 10-17. She further stated that the deposition was used against her and that she was prejudiced by this. App. p. 100, lines 5-6.

Petitioner testified that her blood was drawn at the hospital at approximately 4:45 a.m. While she was at the hospital, a police officer came out to speak with her. She stated that she had

asked for a sample of the blood drawn, and this officer was going to give her one. She was told by the officer that one of the samples was going directly to SLED to be tested and that the second sample would be hers. She further stated that she did not receive the sample. Petitioner testified that she never received the sample because the officer dropped it. App. p. 94, lines 3-25. She stated that the time that the sample was dropped and destroyed was approximately 7:00 a.m., which was about three hours after the blood drawn, so any subsequent draw would have a different blood alcohol content. Because of this, she never had the opportunity to have her blood independently tested. App. p. 95, lines 1-24.

Petitioner testified that she spoke with Mr. Williams about this matter. He indicated to her that her not receiving her sample was not enough to have the results of the blood alcohol content test suppressed, especially since someone had died in the accident. App. p. 95, line 25 – p.96, line 5. She stated that, had the issue of the destroyed blood sample been pursued and the blood alcohol level could have been suppressed, she would not have accepted the plea. App. p.96, line 23 – p.67, line 23.

Prior to entering her plea, Petitioner was kept in the dark about the terms because she was asked to wait outside of the courtroom. App. p.100, lines 10-24. Petitioner stated that she entered the plea because plea counsel told her that if she pleaded straight up, she would get house arrest. Plea counsel further conveyed that Petitioner had a better chance of getting house arrest if she pleaded guilty instead of going to trial. It was at that time she was informed that she was on the trial docket. App. p. 100, line 25 – p.101, line 21.

Petitioner had also been made aware of unusual information, in that he was contacted by the victim's father prior to the entry of her plea. The victim's father told her in December 2016 that he believed this was just an accident and he did not want her to go to prison. It was her

understanding that the victim's father went to the Solicitor's Office and told the Solicitor that he did not want to press charges. She testified that she informed plea counsel about this in hopes it would benefit her, but the father was not at her sentencing hearing. App. p. 101, line 22 – p.102, line 20.

Petitioner further testified that she had a bifurcated hearing. She had a plea hearing on November 2, 2017 and a sentencing hearing was on November 16, 2017. She was confused why she had to go in front of separate judges for the plea and sentencing. She testified that she was told that she had to enter into a guilty plea before it went to trial; but, because she was already on the trial docket, she had to be sentenced in front of the trial Judge. App. p. 103, lines 13-16. She stated that she believed that this was not to her benefit and that the Solicitor was judge shopping. App. p. 103, lines 17-20. She was never told a reason she should have to go in front of a different judge for sentencing, especially because she did not ask for a delay in sentencing. App. p. 103, line 17 – p. 104, line 1.

Assistant Solicitor Todd Wagoner, Esquire

Testimony was presented by Assistant Solicitor Todd Wagoner. Mr. Wagoner testified that he was aware of the civil case and deposition. The victims were civilly represented and had asked him to look at their file. Because he looked at their file, he asked for a copy of everything so that he could "turn it over to defense counsel." He further testified that he would have been able to use the deposition in cross-examination. App. p. 111, line 15 – p.112, line 20.

Mr. Wagoner was asked on cross-examination whether he would have been able to use the sworn testimony of the Defendant. He responded that yes, he would have used it to impeach Petitioner. App. p. 112, lines 13-15

Mr. Wagoner testified that he had only defended (rather than prosecuted) one criminal case in his career. But that it was his understanding when a criminal defendant attorney is advised that there is a deposition scheduled in a matter that is related to a criminal case, that they typically would advise their client to assert their Fifth Amendment rights. App. p. 118, lines 13-22.

Regarding the bifurcation of the plea and sentencing, Mr. Wagoner that he spoke with the Solicitor when he found out Petitioner intended to plead. It was suggested that they take the plea two weeks before the trial was scheduled at a prior term of Court, then defer sentencing and have the assigned trial judge sentence the Petitioner. App. p.113, line 24 – p.114, line 12. "It came to let's plead, lock it in, save the State, you know, the effort we would still need to go through even if it pleads because we need to be ready to go in the event she backs out of the plea." App. p.119, lines 11-14. She was on the trial docket for the week of the sentencing. App. p. 120, lines 1-3. He concluded by saying that because it was a trial and because it was on the trial list, that is why she was sentenced in front of the Trial Judge. App. p. 120, lines 10-13.

Testimony of Plea Counsel, Theo Williams, Esquire

Theo Williams testified that he took over representation from the Public Defender, Mr. Mauldin. In his request for discovery, he received documents and evidence from the civil case. There was a deposition of the Petitioner. App. p. 147, line 14 – p. 148, line 5. Plea Counsel testified that he thought that the deposition and sworn testimony would have an impact upon the jury. He also believed the sworn testimony gave her previous statements more credence and made it more difficult to overcome. App. p. 156, line 20 – p.157, line 19. On cross-examination, Plea Counsel stated he would never advise a criminal client to take a deposition, regardless of whether the deposition helped her or hurt her. This deposition, he testified, hurt her. App. p. 160, lines 15-21.

When asked about the destruction of the blood evidence, Mr. Williams testified that he did not move to suppress the blood evidence because she was pleading to the crime. Further, he remembered being unsuccessful when trying to suppress blood evidence on similar grounds. Regardless, he said he would have moved to suppress the blood evidence if the case had gone to trial. App. p. 149, line 1 – p.150, line 4.

Plea Counsel brought to the attention of the Court the issue of the bifurcated plea and sentencing. App. p.162, line 12 – p.163, line 7. Plea Counsel stated he did not know any reason why Petitioner was not sentenced by the judge that took her plea. That the explanation to him, was that she had to be sentenced by the trial judge because she was on the trial roster. He further stated that he had an email that was sent by Judge Keesley's law clerk to the Solicitor asking if there were any reason why the plea judge could not do the sentencing. App. p.162, line 12 – p.165, line 9. Plea Counsel read the email that he received on November 8, 2017 to the Court in which Judge Keesley asked Mr. Wagoner why Judge Cooper could not hear this case. The response from Mr. Wagoner was that, with this case being on the trial list, the trial judge should be the sentencing judge. App. p. 164, line 10 – p.165, line 9. Plea Counsel testified that he knew of no rule that required the trial judge to sentence a defendant if the case was on the trial docket and that obviously Judge Keesley knew of no rule that said that either. App. p. 165, lines 3-9. When asked what would have been the benefit of having Judge Keesley hear it as opposed to Judge Cooper, Plea Counsel responded, "I don't know, you would have to ask Mr. Wagoner that." App. p. 165, lines 10-14.

A motion was made by the State to leave the record open as to the issue regarding the bifurcated plea and sentencing. This motion was granted by the court and a hearing on this issue was reconvened on September 9, 2019 in Allendale.

Reconvened PCR Hearing

The court reconvened on September 9, 2019 for the purposes of the State to provide a rebuttal witness to the sentencing issue Plea Counsel brought up at the initial hearing. On direct examination, Mr. Wagoner testified Petitioner was sent a trial notice on September 29, 2017. App. p. 185, lines 19-20. She pleaded guilty in the term prior to the term in which she would have gone to trial. App. p. 185, lines 21-22. Mr. Wagoner further testified, "once something is on the trial docket, the policy is that the trial judge is supposed to take all of the pleas off of it. That is subject to the Chief Administrative Judge basically ordering us. You know, go downstairs and go to the plea court for this." App. p. 187, lines 3-9. He then asserted that the instant case deviated from this policy because Petitioner pleaded prior to her trial date. App. p. 187, lines 10- 12. Mr. Wagoner further explained that once a case is on the trial docket, it was not customary to move it over to the plea judge. This is primarily because once a case is on the trial docket, there are no more offers given by the Solicitor. In this particular case, though, the only offer was that the State would remain silent regarding sentencing. App. p. 189, lines 3-11.

Theo Williams, Petitioner's Plea Counsel, also testified. He was asked if it was customary that once a plea was agreed upon to move this case to a plea judge. He responded that it is done periodically. App. p. 195, lines 3-6. He was further asked if he was aware of any firm or hard and set rule that once a case reaches a trial docket it can never be moved to the plea judge. He responded no. App. p. 195, lines 11-14. Plea Counsel further testified that it was his belief that the issue of the Judge mattered to the Solicitor because he did not want anyone but Judge Keesley to issue a sentence. He further stated that the problem that he had with this particular issue was that the Solicitor appeared to be in charge of what Judge you would go in front of by doing it the way that he did. App. p. 195, line 20 – p.196, line 7. Plea Counsel stated:

So if you know a particular judge is going to be the trial judge that particular week, then the Solicitor's Office can choose those cases which it wants to go on the trial roster that week, and by taking this procedure, then you can make sure that whichever person that you put on the trial roster that week can receive whatever sentence that you think would be more beneficial to the State verses any other consideration.

App. p.196, lines 14-21.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-181, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, at 180-181, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The post-conviction relief court erred in denying Petitioner relief when her defense attorneys provided ineffective representation by failing to move to suppress the State's blood-alcohol evidence after the vial containing a blood sample for Petitioner to have independently tested was destroyed by a law enforcement officer, thus preventing her from asserting her statutory right to conduct her own investigation.

S.C. Code § 56-5-2950 (1976, as amended) governs implied consent in the gathering of evidence after an accident where a person is suspected of driving under the influence. In particular, subsection (B)(3) states "the [suspected inebriated] person has the right to have a qualified person of the person's own choosing conduct additional independent tests at the person's expense." Further, the statute provides that the person must be notified in writing of their right to have a person of their choosing conduct additional tests but, if they fail to do so, this does not preclude

admission of the sample tested by law enforcement. S.C. Code § 56-5-2950(D). Even more informative, the statute requires the arresting officer to "provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests." This includes transporting them to a facility to have blood drawn and having SLED test the sample if the hospital cannot or will not. Failure to do this DOES bar admission of any evidence regarding the sample. S.C. Code § 56-5-2950(E).

The courts of this State have held that the rights detained persons are afforded under the informed consent statute are incredibly important. For example, even when a person (here, Pipkin) refused to provide a second vial of blood for independent testing, this court held that his rights were compromised. The officer present at the blood draw took possession of the first vial, "advising Pipkin (1) that the vial would be transmitted to SLED for analysis, and (2) that a second vial would be required if Pipkin desired a back-up test. Pipkin refused to give more blood." State v. Pipkin, 294 S.C. 336, 337, 364 S.E.2d 464, 465 (1988). This Court held that because law enforcement "appropriated the vial, Pipkin could only avail himself of an independent test by having a second sample of blood withdrawn." This Court further held the blood-alcohol evidence should have been suppressed and remanded for a new trial. See also State v. Wilson, 296 S.C. 73, 370 S.E.2d 715 (1988) (admission of blood test results by the State was improper because defendant was not allowed to conduct an independent test, but ultimately not prejudicial because the blood evidence was cumulative to testimony that defendant drank a half pint of vodka and had a .28 breathalyzer result).

A nearly identical fact pattern is found in Fairfax v. Smith, 285 S.C. 458, 330 S.E.2d 290 (1985), in which only one sample was drawn and then held by law enforcement while refusing to let the hospital test it. This Court held that this deprived the defendant of the opportunity to have

an independent facility test the sample and, therefore, the State should not have been allowed to present the analysis it had obtained. The opinion further referenced State v. Lewis, 266 S.C. 45, 221 S.E.2d 524 (1976), which affirmed the portion of the statute that requires law enforcement to affirmatively assist detained persons in obtaining this independent analysis.

Most recently, the Court of Appeals issued an order in State v. Brown, 436 S.C. 505, 873 S.E.2d 445 (2002), also a DUI resulting in death. The court held that the law enforcement officers involved in the case provided affirmative assistance "because they informed Brown of her rights, she was present at a hospital where she could have requested a sample of her blood, and they did not do anything to prevent Brown from obtaining an independent sample." Id., 436 S.C. at 524, 873, S.E.2d at 454. This analysis and these facts differ greatly from Petitioner's.

In the case *sub judice*, two vials of blood were drawn, but one was destroyed by the officer while at the hospital. This occurred approximately three hours after the sample was drawn, so a second draw would have yielded a different blood-alcohol content. App. p.94, lines 15-25. Petitioner testified that the officer, whom she refers to as a trooper[2], destroyed the sample when he dropped the vial at the feet of her grandfather and mother. App. p.94, lines 15-25. Not only that, but "he brought it back to [her] and had a smug look on his face. He was like, you know, you still want your copy now?" App. p.23, lines 10-12. No testimony was presented to counter Petitioner's version of events nor did any party deny that the second vial was destroyed.

Petitioner further testified that that she consulted with Plea Counsel (Mr. Williams) about the incident and was informed that "because someone died in the accident that it would never get suppressed or nothing would ever come of it." App. p.24, 3-5. She also stated that she believed the

[2] At the entry of the guilty plea, Solicitor Wagoner stated that highway patrol responded to the incident. App. p.7, line 18.

officer should never have had possession of the sample as it should have gone to a different department in the hospital for testing, which is why she asked to go to Lexington Hospital. App. p.24, lines 6-15.

Unlike the Wilson case referenced above, the blood alcohol evidence would not have been cumulative to other evidence but rather quite material to Petitioner's case. Mr. Mauldin's recollection of the evidence against Petitioner mostly dealt with evidence of her speeding (65-70 mph in a 60 mph zone) and her statement at the hospital wherein she recalled having four drinks. App. p.139, lines 14-25. Mr. Williams testified that he would have argued the issue at trial because, though he had been unsuccessful on it in the past, he thought "there's been more case law...that indicates you might find a favorable judge who might issue that order because it seems like if she is prevented from testing that, that maybe she ought to at least get a shot at it." App. p.149, lines 18-22. Though he testified that he would have challenged the blood evidence at trial, he did not because she was pleading. App. p.149, line 25 – p.150, line 4.

Failure of either Petitioner's public defender (Mr. Mauldin) or Plea Counsel (Mr. Williams) to move to suppress the blood alcohol evidence is clearly ineffective assistance of counsel. Because the right to independent testing has been held to be so clear and inviolable, it is highly probable that the failure to allow Petitioner to have her blood tested independently would prevent the State from being allowed to introduce the blood alcohol evidence at trial.

By not filing a motion to suppress the evidence prior to Petitioner's plea – an action that could have been taken any time during their representation – both defense attorneys performed ineffectively. This performance is deficient because, under prevailing professional norms, it is unreasonable. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Their failure to attempt to have the blood

evidence suppressed prevented them from exploring the possibility of winning at trial, thus encouraging Petitioner to enter a guilty plea. This is clearly ineffective assistance that led to a predictable and prejudicial result for Petitioner. Certainly, but for the unprofessional and unreasonable errors, the result of the outcome would have been different. Id. As such, Petitioner should prevail on this ground.

II. The post-conviction relief court erred in denying Petitioner relief when her public defender provided ineffective representation by not informing her of her Fifth Amendment right to remain silent when she informed him that she was involved in dram shop litigation related to the accident from which her charge arose?

The goal of every criminal defense lawyer is to protect the rights of their clients. Regardless of whether the goal is acquittal of a charge or mitigation of punishment, their priority is to zealously represent their client while ensuring that their rights under the law are protected. As such, Mr. Mauldin, who was representing Petitioner at that point in her case, provided ineffective assistance of counsel when he did not advise Petitioner about the ramifications of participating in civil litigation related to her charges.

Mr. Mauldin testified that he was informed by Petitioner on December 12, 2015 that a civil case had been filed by Rick Hall and discussed with her the possibility of cooperating in that matter. He explained to her that he could not represent her on civil charges so she would have to hire a civil lawyer. He further testified that he informed Petitioner that he has seen victims speak up for defendants if they cooperate in civil cases, as well as that statements could possibly be used against her at trial. App. p.63, lines 7-25.

Also during direct examination, Mr. Mauldin testified that Petitioner informed him she participated in a deposition in the civil matter and Wesley Waites, Esquire represented her. He

testified that Mr. Waites had never reached out to him about the deposition. He reiterated that he never definitively said Petitioner should not cooperate with the civil case – "I think at the time it was kind of a let's wait and see thing. It wasn't a definite yes, cooperate or a definite no, not cooperate. If the lawyer had contacted me, I would have asked him if he had talked to the lawyer on the other side, you understand, to kind of get the lay of the land before any kind of advice was given on that." App p.147, lines 16-21.

Through all of his testimony, Mr. Mauldin was actually vague in terms of whether the civil action could affect Petitioner's criminal case. It seems that he gave the answer all lawyers are guilty of – "it depends" – and this backfired. This lack of information or commitment to a plan is why Petitioner did not feel the need to inform Mr. Mauldin that she was being deposed - he gave no indication to Petitioner that she should be concerned about the effects of the civil action on her criminal charges. He never informed Petitioner that she could exert her right to remain silent. App. p.88, lines 23-25. He was aware that the dram shop litigation was ongoing and should have undertaken efforts to ensure Petitioner understood the rights and consequences at play regarding her charge.[3]

To effectively represent Petitioner in her criminal case, Mr. Mauldin was required to understand all facets of it and the ways it could expand into other actions. His initial conferences with Petitioner should have included discussions regarding how she should behave or what she should tell him regarding ancillary actions such as a wrongful death suit, dram shop litigation, or insurance settlement. Even though he was not representing her directly in these matters, Mr.

[3] Petitioner recognizes that, ideally, Mr. Waites should have spoken with Mr. Mauldin to understand the criminal case and what should be avoided during the deposition. According to Mr. Mauldin's testimony, Mr. Waites never reached out to have this conversation. App. p.136, line 21 – p.137, line 2.

Mauldin's representation of Petitioner on the criminal charge meant that he had a duty to protect her against negative effects on that charge through his information and advice.

This duty is embodied in various ways throughout our State's rule of professional conduct. For example, Rule 1.4, Communication, requires that "a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished." Similarly, Rule 2.1, Advisor, requires a lawyer to "exercise independent professional judgment and render candid advice." Its comments consider that lawyers must have difficult conversations with clients, as is the nature of our profession. It also discusses that lawyers may have to translate technical advice and/or relate them to relevant moral and ethical considerations. The last comment considers that sometimes advice must be offered without a client asking for it if such advice appears to be in the client's best interest. Certainly, advice about how to navigate related civil matters and, at the least, when to inform him should have been given.

Due to Mr. Mauldin's failure to advise Petitioner about her Constitutional right to remain silent and the potential ramifications of her deposition testimony on her criminal case, he provided ineffective assistance to Petitioner. This failure to provide advice under the prevailing professional norms prejudiced Petitioner because she gave sworn testimony that was provided to the solicitor by a party to the action. This testimony could have been used to impeach her, as evidenced by the solicitor's own testimony during the PCR hearing – "I think the only use I would have got out of it is had she testified, there may be some cross examination in that." App. p.112, lines 3-4 and 13-15.

Even though Mr. Wagoner could not use the deposition as fodder for cross examination at trial, Mr. Hall still managed to make sure the information came in. He was the only person who spoke against Petitioner during her sentencing. Though he was there to speak on behalf of the

victim's families, he used information gleaned during the dram shop litigation and his status as an attorney to add weight to his statement. He mentioned facts of the case, how "horrific" the 911 call was, and similar information. App. p.10-11. The average victim's spokesperson could not have known this information and there is no reason to believe that it did not influence Petitioner's sentence.

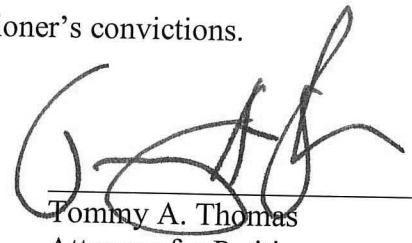
In a similar way, the post-conviction relief court's review of the deposition and its contents was an overstep of its function as a tribunal. The particular allegation before it was whether Mr. Mauldin was ineffective in failing to advise Petitioner of her Constitutional right to remain silent and not attend the deposition. In order to meet that burden, Petitioner had to prove that defense counsel's performance was deficient by measuring its reasonableness under prevailing professional norms and, if it was deficient, consider whether the conduct prejudiced the applicant such "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 686 (1984).

The contents of the deposition and its potential effect at a trial that never happened are irrelevant because Petitioner was not informed of her Fifth Amendment right to remain silent during a deposition. The appropriate analysis here is the same Chief Justice Finney provided in his dissent in Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). That case dealt with a defendant who was not informed of this Fifth Amendment right to remain silent and testified on his own behalf at trial. The majority undertook a lengthy prejudice analysis and determined that defendant was not prejudiced despite his assertions and that there is no reasonable probability that the verdict would have been different because the jury would have only heard uncontroverted evidence of his guilt as presented by the State. Id., 340 S.C. at 596, 533, S.E.2d at 311.

Chief Justice Finney, however, stated simply that if a defendant is not informed of a constitutional right, a new trial must be granted. Id. The essence of the post-conviction relief process is to ensure that convicted persons had constitutionally fair pleas or trials. Though he was representing her in a different, yet directly involved case, Mr. Mauldin had a duty to advise his client about her constitutional rights. The discussions to which he testified included talk of cooperation, for which she would need to understand her fifth amendment rights to be afforded criminal protection. Mr. Mauldin failed to provide reasonable assistance to his client and, as a result, it is highly probable that the outcome of her proceedings was more detrimental to her than it had to be. For these reasons, Petitioner's conviction must be vacated.

CONCLUSION

This Court must remand or dismiss Petitioner's convictions.



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November 15, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Donald B. Hocker, Plea Judge
The Honorable William P. Keesley, Sentencing Judge
The Honorable Brooks P. Goldsmith, PCR Judge

Court Case No.: 2020- 000013

Destiny H. Mills #374576,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Petitioner hereby certify that I emailed, a copy of the Petitioner's Brief to Taylor Smith, Esq. of the Attorney General's Office, at:

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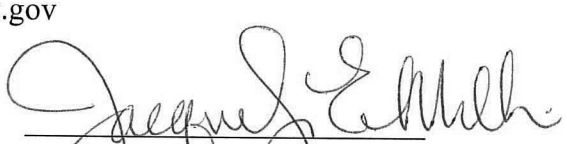

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Irmo, SC
November 16, 2022

THOMAS LAW

November 16, 2022
Via Email

V. Clare Allen, Deputy Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: State, Respondent v. Destiny Mills, Petitioner
Appellate Case No.: 2020-000013

Dear Sir or Madam:

Enclosed please find for filing an Initial Brief of Petitioner and a Certificate of Service..

Please feel free to contact me should you have any questions. Thank you.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem

cc: Taylor Smith, Esq. – via Email
Destiny H. Mills

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