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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari from Sumter County
George C. James, Circuit Court Judge

NATHANIEL BRADLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001121

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Prior to addressing the specific legal arguments presented by Respondent, an important matter appearing in Respondent's "statement of the case" must be corrected. In its summary of the facts adduced at trial, Respondent disingenuously included information elicited during a proffer, which the solicitor chose not to present to the jury based upon an objection posed by defense counsel. BOR at 4. Specifically, Respondent claimed that after the deceased and Petitioner spoke on Thursday the 19th, the deceased told McCray that Petitioner "had threatened him." BOR at 4. During the solicitor's direct examination of Leonard McCray, defense counsel objected when McCray began to testify to what the deceased allegedly said. App. 159, ll. 7-12. Thereafter, the jury left the courtroom. App. 160, l. 2. The judge then asked the solicitor to proffer the proposed testimony. App. 163, ll. 8-11. During the proffer, McCray claimed the deceased told him that Petitioner had threatened him. App. 165, ll. 1-2. When the judge indicated his desire to research the issue prior to ruling on the objection, the solicitor decided "to go forward" without getting into what the deceased allegedly said. App. 168, ll. 13-20. Thus, Respondent's inclusion of information adduced only during the proffer as part of its "facts adduced at trial" section of the brief is misleading at best.

Petitioner now turns to the legal arguments presented by Respondent

I. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by calling Petitioner's brother to testify who harmed Petitioner's alibi defense by contradicting a prior alibi witness and by stating Petitioner was aware of the death prior to the police finding the body.

Respondent's best argument to defeat Petitioner's ineffective assistance of counsel claim regarding trial counsel's elicitation of damaging testimony is that testimony was an estimation only and not "hard evidence." BOR at 12. This argument fails.

Trial counsel called Paul Bradley, Petitioner's brother, to testify as a witness, purportedly to strengthen Petitioner's alibi. App. 930, ll. 20-22. Paul claimed he saw Petitioner on Monday, May 23, 2005. App. 933, ll. 23-25. He claimed Petitioner went to him "around 1:00 in the afternoon" crying because his friend had been killed. App. 934, ll. 1-5. While it is true that Paul's testimony was given as an estimate, it is hard to argue that Paul's memory was so faulty as to be off by several hours. Further, Paul's testimony *directly contradicted* the testimony of Tina Leon and Terrell Johnston who said Petitioner was at a painting job on Monday from 10 a.m. until 4 p.m. App. 901, ll. 11-24; App. 905, ll. 9-13; App. 905, ll. 22-24; App. 909, ll. 19-23; App. 910, ll. 1-7; App. 911, ll. 1-4. Contrary to Respondent's assertion that trial counsel "further mitigated Paul's mistake in a follow-up question by emphasizing that Paul's testimony was based solely on his recollection of an event that happened two and a half years previously, see BOR at 15, trial counsel emphasized that Paul had answered his question by stating "1:00." App. 934, l. 6. Trial counsel's follow-up question did not emphasize that Paul was providing an estimate or even emphasize that Paul's testimony was derived from a memory from over two years prior.

Respondent's current argument that "[n]o reasonable juror would have based his decision on this testimony" is belied by the solicitor's argument at trial and Respondent's argument during the direct appeal. See BOR at 15. In arguing to affirm the denial of the directed verdict motion, Respondent argued that Petitioner's "own brother, Paul, implicated him in the murder. Paul Bradley was called as a defense witness. He testified on direct examination that Bradley told him in a conversation around 1:00 p.m. on Monday, May 21st, that the victim had been killed." App. 1119-1120. Similarly, the solicitor argued in closing that Paul "provided one of the most important pieces of evidence in this case." App. 1034, ll. 19-21. She even noted that it was defense counsel, not her, who asked Paul what time it was on Monday afternoon when Petitioner was crying about his friend's death. App. 1034, ll. 21-23. The solicitor explained that Paul claimed Petitioner was upset at 1:00 in the afternoon, but the body was not found until 1:45 p.m. App. 1034, l. 24 – App. 1035, l. 1. The solicitor argued that Paul testified the conversation happened at "1:00 in the afternoon" and the body "was not found and not reported until 1:45 p.m." App. 1034, l. 24 – App. 1035, l. 1. She rhetorically asked, "How did he know that Ernest was dead if he didn't do it?" App. 1035, ll. 1-2. Contrary to Respondent's current argument that no reasonable jury would have based his decision on this testimony, the solicitor certainly hoped a juror would do just that as evidenced by the closing argument.

Finally, Respondent cites Yarrington v. Davies, 779 F.Supp. 1304 (D. Kan. 1991), and Sallie v. North Carolina, 587 F.2d 636 (4th Cir. 1978), and suggests these cases prevent findings of deficient performance concerning matters of examining and handling witnesses. Our case law – and common sense – easily refute this suggestion. See Ingle v. State, 348 S.C. 467, 471, 560 S.E.2d 401, 403 (2002) (granting relief where defense counsel called a witness to the stand without interviewing the witness); Martin v. State, 427 S.C. 450, 456-457, 832 S.E.2d 277, 280-

281 (2019) (failure of trial counsel to elicit the precise timing of an event from a witness called at trial in order to establish an alibi was ineffective assistance of counsel); Ard v. Catoe, 372 S.C. 318, 334-335, 642 S.E.2d 590, 598-599 (2007) (holding trial counsel's decision to not cross-examine the state's gunshot residence expert was not an objectively reasonable strategy that prejudiced Ard).

II. Violating Petitioner's Sixth and Fourteenth right to the effective assistance of counsel, trial counsel failed to present a telecommunications expert to use the cell phone records to support Petitioner's alibi defense.

Respondent accused Petitioner of failing to show how retaining a telecommunications expert would have affected the result of the trial. Petitioner thoroughly explained how the retention of expert, like Levitan, who was retained for the PCR hearing, would have likely changed the result of the trial in his brief and will not belabor the point any longer except for one small point. Respondent asserted that “[Petitioner] complains that trial counsel should have called an expert such as Ben Levitan, who could have showed the jury ‘charts and maps’ to illustrate the information,” but claimed that “trial counsel did use maps to demonstrate the locations of the cell towers.” BOR at 18. Respondent provided no citation to support his claim that trial counsel “did use maps to demonstrate the locations of the cell towers.”

According to the trial transcript, trial counsel did not introduce any maps as exhibits. App. at 10. During trial counsel's examination of McMillan, there is no indication that trial counsel is using a map. See App. 765, l. 9 – App. 791, l. 10. Rather, trial counsel attempted to use State's Exhibit #54, which was a map, but he soon discovered it was deficient. App. 779, ll. 10-20. Insisting he had a “better map,” trial counsel sought a break to get the “other map.” App. 779, ll. 21-24. This request was granted. App. 779, l. 25. However, when questioning resumed, there was no indication that trial counsel used a “better map” to question McMillan. App. 782, l. 11 – App. 791, l. 10.

In fact, he resorted to using the lesser map when he asked McMillan to tell the jurors where a particular location was on State's Exhibit #54, and McMillan could not do so. App. 783, l. 23 – App. 784, l. 11. When he did use another map, it could hardly be said to be a better map

as it was “a little map ... from the Chamber of Commerce” that was “not to scale.” App. 784, ll. 12-17. When the state objected to trial counsel’s questioning based on deficiencies of the Chamber of Commerce map, trial counsel went back to the subpar State’s Exhibit #54. App. 785, l. 13 – App. 786, l. 6.

Furthermore, Respondent’s argument that “[t]rial counsel did not have the luxury of calling expert for every conceivable issue” due to lack of funds on Petitioner’s part is offensive to the extent it suggests the unsavory notion that justice is for the rich. See e.g., Reeves v. State, 415 S.C. 366, 377 n.5, 782 S.E.2d 747, 753 n.5 (Ct. App. 2015) (citing S.C. Code Ann. § 17-3-50(B) and holding trial counsel was ineffective for failing to seek an expert where the South Carolina Office of Indigent Defense could have provided the funds needed to secure an expert witness if the defendant were indigent). Not only had trial counsel sought and received funds for an investigator, but trial counsel’s feeble examination of the unqualified police officer regarding the phone records paled in comparison to Levitan’s testimony at the PCR hearing.

Respondent asserted “[t]here is a 50-minute gap¹ in the calls from [Petitioner]’s phone on Sunday morning.” BOR at 20. Respondent claimed “[t]he records show there were no calls between 8:45 (which connected to tower #6472 near the cemetery) and 9:34 (also tower #6472).” BOR at 20. The citation offered by Respondent to support this proposition, App. 1065, does not. Petitioner’s phone records for the time period referred to by Respondent appear on page 1605. Those records show Petitioner placed a call at 8:45:59 a.m. and the call ended at 8:46:04 a.m. App. 1605. Petitioner then placed a call at 9:34:10 a.m. and the call ended at 9:34:24 a.m. App. 1605. Respondent claims for the first time that because Levitan testified that “Boyle’s Pond was roughly 23 miles away from the ‘cloud’ where he estimated [Petitioner]’s phone would have

¹ Later, Respondent correctly calculates this gap as 49 minutes. BOR at 20.

been when it made those calls,” then “[Petitioner] could easily have driven from the ‘zone’ established by Levitan to Boyle’s pond and back within that 49-minute period.” BOR at 20. Interestingly, neither the solicitor nor the lawyer who represented the state at the PCR hearing questioned McMillan or Levitan regarding this hypothesis. Perhaps, this line of questioning was omitted because no one familiar with the area would fathom that someone would travel at roughly double the posted speed limits presumably with a dead body in tow on busy two-lane roads. App. 107, ll. 19-23 (Lundberg testifying that the traffic was “sometimes busy, sometimes not,” but usually “steady”).

Next Respondent asserted “[t]he 9:52 and 10:34 (*sic*) calls connected to tower #6472, which is quite near the cemetery, and close to tower #6473, which Levitan claimed would have been the tower used by Bradley’s cell phone if he had made a call from the cemetery.” BOR at 21. The records actually show that the call placed at 9:52:29 a.m. used Tower #6471, and the call placed at 10:24:25 a.m. used Tower #6472. App. 1605; see also App. 1283, ll. 13-14. Tower #6471 was located at 969 Horse Pen Road in Camden, nowhere near the cemetery. App. 777, ll. 2-9; App. 1562; App. 1570.

Respondent argues that “to the extent the records did cast doubt on Koenig’s identification, an expert would not have strengthened [Petitioner]’s arguments” because “[t]rial counsel elicited this exact same information” and “[t]he jury could read them themselves, and no expert testimony was needed.” BOR at 21. The errors in Respondent’s brief concerning what the records show damages, if not completely annihilates, Respondent’s argument that the jury could read the documents themselves and learn the same information relayed by Levitan during the PCR hearing.

Respondent relies upon the Fourth Circuit's opinion in Washington v. Murray, 4 F.3d 1285 (4th Cir. 1993) to support its argument that Petitioner suffered no prejudice as a result of trial counsel's failure to hire an expert because the state's arguments would have been exactly the same is troubling. See BOR at 22. Washington sought relief from his convictions for murder and rape based upon his counsel's failure to present forensic evidence regarding body fluids on a blanket. Washington v. Murray, 4 F.3d 1285, 1286 (4th Cir. 1993). After hearing the proposed forensic evidence, the court concluded the evidence was "inconclusive." Id. at 1287. In conducting the prejudice analysis, the Court of Appeals for the Fourth Judicial Circuit noted the prosecution never relied on any evidence from the stains on the blanket to link Washington to the rape. Id. at 1289. While this case remains good law, what is troubling about Respondent's reliance on it is that Washington was *exonerated* by DNA evidence and pardoned. See <https://innocenceproject.org/cases/earl-washington/> (last visited on November 30, 2022).

III. Violating Petitioner's Sixth and Fourteenth right to the effective assistance of counsel, trial counsel failed to present an arson expert to establish a timeline for when the car was set afire to enable Petitioner to defeat the testimony of Koenig, the state's only eyewitness.

Respondent characterized Olson's testimony as flawed because he contended the car would have been hot when it was discovered if it had been burned when the state alleged. BOR at 23. Respondent alleged, "None of the witnesses stated the car was not hot at 3:00 p.m." BOR at 24. Thomas McCutchen who discovered the burned car testified that he could tell it was recently burned, that it was not smoking, and that he did not touch the car. App. 353, ll. 9-11. Robin McCutchen also did not touch the car.² App. 357, ll. 19-21. Claude Lloyd, the first officer on the scene with the car, described it as "pretty much burnt to a crisp" at 3:35 p.m. App. 360, ll. 9-20. He likewise did not touch the car, but he believed it was "recently burnt" based on the strong smell of burning still in the air. App. 361, ll. 8-16. He said the car was "burnt completely up... inside and out ... even the tires were burnt off of it." App. 365, ll. 21-25. The tow truck driver did testify that the car was not hot to the touch and that he was wearing gloves just as Respondent noted. BOR at 24. However, Respondent's summary of the tow truck driver's testimony omits significant portions.

The tow truck driver was adamant that the car was not hot. He stated, "But the car was not, you know, hot, because I take my hand and touch it to the top of the car, you got to burn it where the hook at. If that car was hot, it would have burned through my gloves. I would feel some kind of heat from it, which that car was not hot." App. 1443, l. 25 – App. 1444, l. 5. He

² At the PCR hearing, trial counsel recalled that the witnesses who found the car "said it was cool to the touch." App. 1467, ll. 10-12. He even claimed that he had been able to elicit on cross examination that the car was cool to the touch. App. 1535, ll. 19-24. It was based on this belief that he did not think an arson investigator was necessary. App. 1536, ll. 2-11.

felt no heat on his face and no radiant heat. App. 1444, ll. 6-13. He was adamant, “[T]he car was not hot.” App. 1444, l. 15; see also App. 1445, l. 6.

Respondent claims that Koenig “probably” saw Petitioner “around 9:10 a.m. despite Koenig’s own contrary testimony. BOR at 26. Koenig testified that he saw the Volvo at “approximately 9:30” in the morning. App. 629, ll. 6-8. He later stated that he arrived at the property at 8 a.m. and broke for lunch around 11:30 a.m. App. 659, ll. 16-20. He recalled his neighbor visited him around 10:15, which was after the car had driven past him. App. 659, ll. 21-22. He believed the car passed him “closer to 9:30 because at 10:15 [his neighbor visited] and it had been prior to that by at least a half an hour to 45 minutes.” App. 659, l. 23 – App. 660, l. 1. Thus, Koenig’s own estimate was that the earliest he saw the car was at 9:30 and the latest was at 9:45. Koenig was unwilling to estimate a time earlier than 9:30, as Respondent desperately wants.

Here again, Respondent argues that Petitioner was driving approximately double the posted speed limit in a stolen car in order to satisfy the state’s timetable. BOR at 26 (stating Petitioner” could have driving the 26 miles to the cemetery in 25 minutes). Not only does this defy common sense, but it contradicts the state’s key witness – Koenig – who described the car as going slowly when he saw it. App. 655, ll. 3-11.

The PCR judge concluded that trial counsel “clearly cross-examined the state’s witnesses” on the topic of arson. App. 1738. Although Respondent appears to have abandoned the argument that trial counsel “clearly” cross-examined the state’s witnesses on arson, it is worth noting that trial counsel’s attempts to elicit testimony about the arson either were met with equivocal or inconclusive answers. For example, Clarence McMillan testified that he had no idea how long it took for the car to burn. App. 737, ll. 17-18.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court and hold trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of November, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is jedwards@scag.gov this 30th day of November, 2022.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

From: [Stock, Chris](#)
To: [SC - EDWARDS JOSHUA](#); [Leigh Ann Stone](#)
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Subject: Bradley, Nathaniel - Reply Brief of Petitioner - 2018-001121
Date: Wednesday, November 30, 2022 4:28:00 PM
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Mr. Edwards,

Please find attached for service the Reply Brief of Petitioner for Nathaniel Bradley's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock

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