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Apr 24 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
William H. Seals, Jr., Circuit Court Judge

Circuit Court Case No. 2017-CP-26-02564
Appellate Case No.: 2020-001265

Marcus Dwain Wright, 289646, Petitioner,
v.
State of South Carolina, Respondent.

REPLY BRIEF

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April 23, 2023.

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ARGUMENT IN REPLY

The Respondent argues that trial counsel's failure to notify the court immediately that his client had decided to testify was based on a reasonable strategy. This argument presumes that it can somehow be permissible for a defendant's attorney to decide, over the will of a competent defendant, whether the defendant will be allowed to exercise the right to testify in his or her own behalf. This is repugnant to the constitutional right to testify in one's own behalf in a criminal case. The Respondent is clearly arguing that an attorney can prevent a competent defendant from testifying if it conflicts with the attorney's trial strategy. The Respondent fails to cite authority for the premise that a defendant's right to testify rests on whether or not the defense attorney believes that it fits well with the attorney's trial strategy, or that otherwise that preventing a defendant from exercising the right to testify can in any way be considered a reasonable trial strategy under Strickland. To the extent that a defendant's exercise of his or her right to testify may not appear beneficial to the defense, the decision of whether or not to testify remains a personal right that the defendant alone must be allowed to make. The right to testify in one's own defense is a fundamental right of prime importance. Rock v. Arkansas, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); 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). If Appellant intentionally misled the Appellant by telling him that it was too late to do anything and refuse to immediately inform the court to prevent the Appellant from testifying

The State argues that there is no evidence that the trial judge would have granted a motion to reopen even had one been made before the trial resumed that morning. This overlooks the fact that at the point the Appellant informed counsel of his desire to testify there was no valid

basis for the court to deny the Appellant the right to testify. The only stated basis for the trial court's refusal to allow the Appellant to testify was that the Appellant had waited until the court had made a ruling before he changed his mind and decided that he wanted to testify thus giving him an unfair opportunity to conform his testimony to the court's rulings. The record is clear that this was not the case and therefore, had counsel immediately informed the court of his client's desire to testify before the trial resumed and the court made rulings on the jury charges, the court would have had to grant the Appellant that right. Had it not, the issue would have been preserved for direct appeal and there would have been no facts to support a denial of Appellant's right to testify. In that case the Appellant would have been entitled to a reversal of any conviction in direct appeal.

The Respondent's statement that Appellant "does not refute the PCR court's finding he was not prejudiced by trial counsel's performance" is a complete mischaracterization of the Appellant's argument. Clearly the Appellant has argued that trial counsel's deficient performance prejudiced him, so much so that a particularized analysis of specifics and degree of that prejudice is not necessary under the facts of the case and the holding of State v. Rivera, 402 S.C. 225, 741 S.E.2D 694 (2013). It is simply not necessary to engage in a discussion as to how valuable to the case his testimony might have been and therefore how much prejudice might have occurred from its exclusion. The normal analysis under Strickland to evaluate the strength of evidence in light of the overall evidence in a case is not applicable. The prejudice lies in the violation of the Appellant's right to testify. The right to testify is not based in on how good or bad for the case a defendant's testimony is judged to be. "[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).

As to all issues raised in the Respondent's Brief not specifically addressed herein, Appellant relies on those facts and arguments presented in the Appellant's Brief.

Conclusion

Based on the foregoing, and as well as the arguments presented in the Appellant's Brief, the decision of the circuit court should be reversed, the Appellant's convictions reversed, the Appellant's sentences set aside, and a new trial granted.

Respectfully submitted,

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