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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Sumter County
George M. McFaddin, Circuit Court Judge

MATTHEW C. DWYER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000810

SUPPLEMENTAL APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Matthew C. Dwyer, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-002210

Appeal From Sumter County
George M. McFaddin, Jr., Circuit Court Judge

Unpublished Opinion No. 2023-UP-121
Submitted January 1, 2023 – Filed March 22, 2023

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Petitioner.

Assistant Attorney General Zachary William Jones, of Columbia, for Respondent.

PER CURIAM: This Court granted certiorari to review the post-conviction relief (PCR) court's finding Petitioner Matthew Dwyer failed to prove his trial counsel was ineffective for advising him against testifying at trial. We affirm.

Dwyer was charged with the murder of John Singleton. During his opening statement, trial counsel asserted the defense would provide evidence that Dwyer killed Singleton in self-defense. However, at the beginning of trial, the State provided the defense with a copy of a letter Dwyer had mailed a friend of his, requesting the friend provide a false alibi for Dwyer on the night of the murder. Dwyer did not testify at trial. During the PCR hearing, counsel testified he instructed Dwyer that the decision to testify was up to him, but if Dwyer decided to do so, the State could impeach him with the content of the letter. Counsel averred that both he and Dwyer agreed it was too risky for the latter to testify in his defense.

We find that probative evidence supports the PCR court's finding that trial counsel was not deficient. *See Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding a reviewing court "will uphold [the factual findings of the PCR court] if there is any evidence of probative value to support them"); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (providing that deficiency is the first prong of an ineffective assistance of counsel claim); *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" (quoting *Strickland*, 466 U.S. at 690)); *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Additionally, we hold the PCR court did not err by finding Dwyer failed to prove he was prejudiced by trial counsel's alleged error. *See Strickland*, 466 U.S. at 694 (stating that to prove prejudice, a PCR applicant "must show that there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different"). The State presented extensive evidence of Dwyer's guilt, including DNA evidence recovered from Victim's body. Further, Petitioner failed to provide evidence of what testimony he would have offered at trial that would have supported a claim of self-defense.

AFFIRMED.[1]

KONDUROS, HEWITT, and VINSON, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

MATTHEW C. DWYER,

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V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2018-002210

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

Opinion No. 2023-UP-121

PETITION FOR REHEARING

On March 22, 2023, this Court affirmed the post-conviction relief (PCR) court's finding that Petitioner Matthew Dwyer failed to prove his trial counsel was ineffective for advising him against testifying at trial. Dwyer v. State, Op. No. 2023-UP-121 (S.C. Ct. App. filed March 22, 2023). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

On appeal, Petitioner argued his Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and

suddenly advised Petitioner not to testify since such advice was due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense. Petitioner further argued that he was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if he had testified and presented evidence that he was acting in self-defense during the altercation with the decedent.

In its unpublished opinion, this Court held in a conclusory manner that there was probative evidence to support the PCR court's finding that trial counsel was not deficient. This Court further held the PCR court did not err by finding Petitioner failed to prove he was prejudiced by counsel's "alleged error" because the state presented extensive evidence of Petitioner's guilt, including DNA evidence recovered from the decedent's body. Additionally, this Court emphasized that "Petitioner failed to provide evidence of what testimony he would have offered at trial that would have supported a claim of self-defense." For the reasons that follow, Petitioner respectfully requests this Court grant rehearing, reverse the PCR court's decision denying Petitioner relief, and remand for a new trial.

Petitioner had consistently maintained his desire to testify in his defense at trial. Trial counsel admitted the strategy before trial was that Petitioner was going to testify. Counsel even informed the jury during his opening statement that Petitioner would testify and explain what happened in the car that led to the alteration and ultimate death of the decedent. Counsel insisted the evidence would show Petitioner acted in self-defense. Notably, this Court maintained in its opinion that trial counsel merely told the jury during his opening statement that "the defense would provide evidence" that Petitioner killed the decedent in self-defense. Respectfully, this is incorrect. Counsel unequivocally asserted that Petitioner would testify. Counsel told the jury in part: "[T]his is a case of self-defense. . . . **Mr. Dwyer [Petitioner] is not going to get up there**

and say that didn't [happen]. ***He is going to get up there and explain why it happened. . . .*** **Mr. Dwyer is not going to say this didn't happen.** ***He's going to explain why it happened.*** App. 76, l. 5 – 78, l. 25 (emphasis added).

Notwithstanding his opening statement, in the middle of trial, after learning of a letter Petitioner had written to Demetrius Cooper requesting Cooper create an alibi for Petitioner for the night of the altercation, counsel suddenly advised Petitioner that he should not testify. Counsel's advice was based largely on the fact that Petitioner would be subject to cross-examination about the contents of the letter. However, Cooper had already testified about his receipt of the letter and published its contents to the jury. Therefore, the jury was aware that Petitioner had written to Cooper requesting an alibi. Moreover, counsel erroneously believed there was sufficient evidence presented during the state's case in chief for Petitioner to obtain a jury instruction on self-defense.

Counsel's advice constituted deficient performance because, in advising Petitioner not to testify, counsel demonstrated his misunderstanding of the law of self-defense and the requirements needed to obtain a jury instruction on self-defense. Any reasonably competent criminal defense attorney would have known that it would be near impossible to establish Petitioner was acting in self-defense during the physical altercation with the decedent without Petitioner's testimony. Counsel also should have known that the trial judge was going to refuse to charge self-defense based only on the evidence presented during the state's case in chief. Moreover, if anything, the admission of the letter should have been an additional reason in favor of Petitioner testifying so that Petitioner could explain to the jury why he sought an alibi despite his position that he was acting in self-defense when he shot the decedent that night.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified in his defense and explained why he sought an alibi from Cooper, and presented evidence that he was acting in self-defense during the altercation with the decedent.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-88.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant

chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Rule 609, SCRE). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), our Supreme Court held trial counsel was ineffective when he failed to consider the possibility of Foye testifying in his defense given the evidence presented at trial. Foye was charged with trafficking cocaine. Id. at 588, 518 S.E.2d at 266. He was tried jointly with his father. Id. at 591, 518 S.E.2d at 268. After his father told Foye's counsel that he would testify Foye did not know cocaine was in the gym bag, counsel advised Foye not to testify because of his prior convictions. Id. However, at trial, his father testified he told Foye cocaine was in the gym bag as the pair were walking into the hotel to deliver the drugs and that Foye wanted to help his father because he was afraid his father would get hurt. Id. The two passed the bag back and forth before his father insisted Foye should not get involved and took the bag away from him prior to entering the hotel. Id. Foye waited in the lobby while his father delivered the cocaine. Id.

The Court held Foye's counsel was ineffective because he did not consider the possibility of Foye testifying after his father's damaging testimony. Id. at 592, 518 S.E.2d at 268. The Court concluded "counsel failed to use his discretion in employing an appropriate trial strategy in light of the unexpected testimony." Id. The Court emphasized counsel's admission that it may have been proper to put Foye on the stand after his father's damaging testimony. Id.

In this case, trial counsel was deficient because he abandoned his trial strategy midtrial and failed to utilize his discretion when he advised Petitioner not to testify. His advice was also based on a misunderstanding of the law of self-defense. It is undisputed that Petitioner's trial strategy was to argue self-defense and that he intended to testify. Counsel informed the jury during his opening statement that Petitioner was going to testify and that he was acting in self-defense during the altercation. See App. 76, l. 5 – 78, l. 25. However, because of a letter Petitioner wrote to a friend requesting he create an alibi for Petitioner, counsel threw his strategy out the window, and advised Petitioner not to testify. This advice was based on counsel's incorrect belief that the trial judge would charge self-defense based on Petitioner's brother's testimony alone. Moreover, Petitioner could have easily explained to the jury why he wrote the letter to Demetrius Cooper, despite asserting he was acting in self-defense during the altercation. Petitioner was facing a murder charge, which carries up to life without parole, and was desperate to avoid a trial and conviction.

Petitioner was prejudiced by trial counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if Petitioner would have testified that he was acting in self-defense during the altercation with Singleton, which Petitioner had maintained since "day one." App. 574, ll. 3-10. Because of counsel's faulty advice, Petitioner ultimately did not testify, and counsel was forced to argue lack of malice and voluntary manslaughter in closing, which completely contradicted what counsel told the jury during his opening statement and made counsel not credible before the jury.

In its unpublished opinion, this Court held Petitioner failed to prove he was prejudiced by counsel's "alleged error" because the state "presented extensive evidence of [Petitioner's] guilt, including DNA evidence recovered from [the decedent's] body." However, as evidenced by trial counsel's opening statement, Petitioner did not dispute he was present in the car when the

decedent died and was responsible for the decedent's death. Rather, Petitioner maintained he acted in self-defense. Consequently, the presence of Petitioner's DNA on the decedent's body was inconsequential and could not have contributed to the verdict as Petitioner's identity was not in dispute. In other words, the presence of Petitioner's DNA was relevant as to identity, which Petitioner did not contest, but not as to whether Petitioner shot the decedent with malice or in self-defense. Moreover, unlike this Court held, there was sufficient evidence of what testimony Petitioner would have offered had he testified at trial. Petitioner would have explained why he was present in the car with the decedent, that the decedent pulled over and aggressively tried to force Petitioner to perform "sexual favors," that a physical altercation resulted, that Petitioner "stumbled across a gun" that was already in the decedent's car while the two were fighting, and finally that Petitioner fatally shot the decedent in self-defense. See App. 276, l. 1 – 277, l. 10.

Respectfully, this Court should hold the PCR court erred by finding counsel was not ineffective, reverse Petitioner's convictions, and remand for a new trial.

Based on the foregoing, Petitioner respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming the PCR court's finding that Petitioner failed to prove trial counsel was ineffective for advising him against testifying at trial.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of April, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

MATTHEW C. DWYER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-002210

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Zachary W. Jones, Esquire, at the primary email address listed in the Attorney Information System (AIS); and Matthew Cory Dwyer, #346172, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of April, 2023.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

Matthew C. Dwyer, Petitioner,

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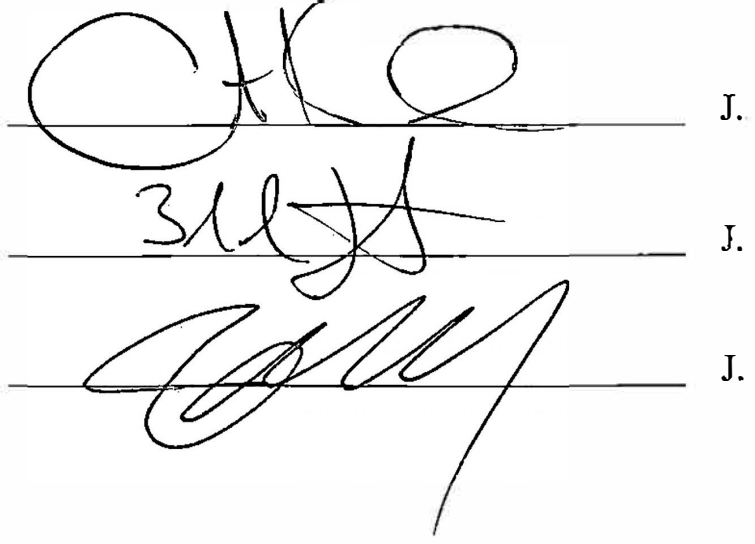
State of South Carolina, Respondent.

Appellate Case No. 2018-002210

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.

J.

J.

Columbia, South Carolina

cc:
Lara Mary Caudy, Esquire
Zachary William Jones, Esquire .

FILED
Apr 20 2023