STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Clifton Newman, Circuit Court Judge

RECEIVED

Aug 30 2023

S.C. SUPREME COURT

GENE D. EVANS, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001590

PETITION FOR WRIT OF CERTIORARI

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Did the PCR court err in finding trial counsel provided effective assistance where counsel challenged the blood draw and results during a pre-trial suppression motion but failed to secure a ruling on both grounds argued in support of suppression and failed to object to the admission of the blood results during trial which precluded appellate review of the motion?

STATEMENT OF THE CASE

On February 12, 2017, Shonda Brown and her boyfriend Andrew Moye were traveling down Saint Paul Church Road in Sumter County, South Carolina, when they encountered a RV approaching in their lane. Brown, who was driving, swerved to the right so that the RV would not strike her vehicle head on. The driver of the RV overcorrected back into its lane, ran off the road and struck a tree. App. 156, l. 16-App. 159, l. 17. Moye ran to the RV, opened the driver side door, and pulled a man, later identified as Petitioner, out from the under the steering wheel. App. 170, l. 3-App. 171, l. 15; App. 174, ll. 2-16. Once Moye had removed Petitioner from the vehicle, he saw another individual in the RV. He attempted to remove the other person, later identified as Robert Skidmore, from the RV but could not get him out due to the amount of stuff that was on top of Skidmore. App. 97, ll. 20-23-App. 172, ll. 5-23. The RV, which had been smoking, eventually caught fire which prevented further attempts to rescue Skidmore from the vehicle. App. 172, l. 23-App. 173, l. 15. Petitioner was airlifted from the scene to Richland Memorial Hospital. App. 132, ll. 8-16.

Unfortunately, Skidmore died during the collision. App. 37, ll. 16-18. An autopsy of Skidmore performed the day after the accident revealed that he suffered a broken neck, a fractured skull, and a brain bleed during the wreck. His official cause of death was blunt force injury to the head due to the motor vehicle collision. There was no evidence discovered during the autopsy to indicate that Skidmore was alive at the time the RV caught fire. App. 97, ll. 20-23; App. 101, l. 25-App. 104, l. 25. The toxicology results of the autopsy showed that Skidmore was under the influence of methamphetamine at the time of his death. App. 239, ll. 6-18.

Trooper Kevin Boland of the South Carolina Highway Patrol was the initial responding officer who documented the scene and took witness statements before going to Richland

Memorial Hospital to speak with Petitioner. App. 115, l. 12-App. 119, 24; App. 131, l. 17-App. 132, l. 20. According to Trooper Boland, Petitioner would mumble and nod his head in response to questions and while the "mumbles were hard to understand," the head nods "were clear on." When he asked if Petitioner was Gene Evans, Petitioner nodded yes. When he asked Petitioner if he knew what had happened, Petitioner nodded no. Trooper Boland advised Petitioner that he was in a serious car wreck and requested a voluntary blood sample as part of the investigation to which he alleged Petitioner nodded yes. App. 133, l. 1-App. 134, l. 23. A nurse that was tending to Petitioner drew his blood and immediately turned in over to Trooper Boland. App. 135, ll. 14-25. The toxicology results of the blood draw revealed that Petitioner had .78 milligrams of methamphetamine and .11 milligrams of amphetamine per liter of blood in his system. App. 233, ll. 6-17.

Petitioner was arrested on April 9, 2017. App. 138, ll. 17-24. The Sumter County grand jury indicted Petitioner for one count of felony driving under the influence, death resulting, during its October 2017 term. App. 496-497. The State, represented by John Meadors, called the case to trial on February 20, 2018, before the Honorable Howard P. King and a jury. Petitioner was represented by appointed counsel Timothy Griffith. App. 1.

Prior to the start of trial, Counsel Griffith made a motion *in limine* to suppress the blood draw and any results thereof. He argued that the samples and results should be suppressed because the State had failed to comply with the mandates of S.C. Code Ann. § 56-5-2950. App. 28, l. 13-App. 29, l. 5. In response the State argued that pursuant to State v. Cribb[1] section 56-5-2950 was inapplicable to pre-arrest DUI investigations and Petitioner was not under arrest at the time of the blood draw. The State further argued that 56-5-2950 did not apply to felony DUI

[1] 310 S.C. 518, 426 S.E.2d 306 (1992)

cases, that S.C. Code Ann. § 59-5-2946 applied, and that Petitioner had consented to the blood draw. App. 29, l. 24-App. 33, l. 17. Counsel Griffith replied that 56-5-2950 was controlling and that Petitioner denied giving his consent for the blood draw. App. 33, l. 25-App. 35, l. 13.

The State called Trooper Boland to testify during the pre-trial hearing regarding his communications with Petitioner in obtaining the blood draw. Trooper Boland testified that Petitioner communicated with him primarily through head nods. He stated Petitioner would mumble but he was "very very hard to understand." He testified Petitioner tracked him with his eyes and would either nod yes or no to the questions he asked. App. 38, l. 13-App. 39, l. 12. Trooper Boland testified he was requested a voluntary blood sample from Petitioner and that Petitioner consented by nodding his head yes. He further testified that he never saw Petitioner shake his head no or draw his arm away from the nurse in an attempt to refuse the blood draw. App. 40, l. 7-App. 41, l. 10.

On cross-examination, Trooper Boland stated the blood draw occurred approximately three hours after the accident. He admitted that Petitioner was strapped to a back board and was in a C-collar when he questioned him. He stated that he did not give Petitioner any implied consent warnings because Petitioner was not under arrest. He was unaware that Petitioner had been given fentanyl citrate while being transported to the hospital or that Petitioner[2] had a concussion. App. 45, l. 1-App. 48, l. 17; App. 50, ll. 1-18; App. 51, l. 24-App. 52, l. 3. He maintained that Petitioner volunteered the blood sample and that he would not have taken it against his will but would have gotten a search warrant. App. 50, l. 24-App. 51, l. 9.

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2 Petitioner also broke his clavicle, sternum, knee, and several ribs during the accident. He also had large laceration to his head as well as damage to his skull underneath his eye. App. 270, l. 21-App. 271, l. 2; App. 273, ll. 13-16.

Petitioner did not testify during the suppression hearing because he could not remember anything that happened in the days following the accident. App. 52, l. 19-App. 53, l. 7. The trial court ruled that under the holding in Cribb the mandates of section 56-5-2950 did not apply to pre-arrest investigation into DUIs and therefore the State was not required to comply with the statutory provisions until an arrest had been made. The trial judge concluded that Petitioner was not under arrest at the time of the blood draw and was therefore not entitled to the protections of the implied consent law. He ruled the blood draw and results admissible. At no point did the trial judge rule on whether Petitioner had voluntarily consented to the blood draw. App. 66, l. 1-App. 67, l. 11.

During trial, two witnesses testified about the presence of methamphetamine in Petitioner's system. Trooper Boland testified, without objection, that the "results showed that Mr. Evans did test positive for high level of methamphetamine on the day of the collision." App. 138, ll. 14-19. Later in the trial Kevin Selinsky, a forensic toxicologist with SLED, testified without objection that Petitioner had methamphetamine and amphetamine, a metabolite of methamphetamine, in his system on the day of the accident. App. 233, l. 6-App. 234, l. 4. He further opined that Petitioner was under the influence of methamphetamine at the time of the blood draw. App. 236, l. 19-App. 237, l. 4. He also stated that the level of methamphetamine in Petitioner's system was "in the high range." App. 245, ll. 9-15.

Petitioner testified in his own defense. He maintained that Skidmore had been driving the RV at the time of the collision. Petitioner testified that while driving the RV Skidmore "jumped up" and began pulling on the steering wheel. Petitioner reacted by lunging for the steering wheel as the RV went off the road. Petitioner had no memory of the accident after lunging for the steering wheel and did not remember the first few days that he was in the

hospital. App. 269, l. 1-App. 274, l. 17. Petitioner maintained that he had could not have given Trooper Boland consent to draw his blood. App. 277, l. 21-App. 278, l. 12.

Petitioner was found guilty as indicted after a three-day trial. App. 370, ll. 8-20. Judge King sentenced Petitioner to twelve years imprisonment with credit for time served. App. 385, ll. 12-17; App. 498. Petitioner appealed his conviction and sentence. The South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Anders v. California[3] in an unpublished opinion. State v. Evans, Op. No. 2020-UP-119 (S.C. Ct. App. filed April 29, 2020). Petitioner filed an application for post-conviction relief on June 24, 2020, alleging ineffective assistance of counsel for, *inter alia*, failing to adequately challenge the blood draw and for failing to argue the blood draw was a violation of the Fourth Amendment. App. 387-412. The State filed a return and partial motion to dismiss dated March 10, 2021. App. 413-420.

An evidentiary hearing was convened on June 28, 2022, before the Honorable Clifton Newman. The State was represented by Megan Jameson. Petitioner was represented by James Falk. App. 421. No amendments to Petitioner's *pro se* PCR application were filed. App. 426, ll. 9-12.

Petitioner testified that Counsel Griffith came to speak with him twice at the jail but never provided him with discovery and stated they did not have many discussions during trial. App. 438, ll. 3-20; App. 440, ll. 17-24. He testified that he remembered the suppression motion but did not remember any specifics of the hearing. App. 449, ll. 7-19. He reaffirmed that he had no recollection of speaking with Trooper Boland, could not have given consent for the blood draw, and had no memory from the accident through the first three days in the hospital. App. 453, ll. 1-17.

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3 386 U.S. 738 (1967)

Counsel Griffith testified that he filed a motion to suppress the blood draw and results based on the State's failure to comply with the statute and that Petitioner was under the influence of a lot of medication at the time the blood draw was taken. He stated he believed that he argued that the blood draw could not have been voluntary because Petitioner was not in any condition to give consent. App. 456, l. 17-App. 455, l. 9. Counsel Griffith testified he did not recall if he renewed his objection to the admission of the blood results when the SLED agent testified but stated that based on the transcript it appeared that he had not objected. The State objected to this line of questioning and Counsel Falk responded that the failure to object to the admission of the blood during trial was part of the failure of Counsel Griffith to challenge the blood draw and results. The PCR court overruled the objection. App. 456, l. 2-App. 457, l. 5. On cross-examination, Counsel Griffith testified that he felt he was quite prepared for trial. App. 458, ll. 12-13. He confirmed he filed a suppression motion and argued it pre-trial based on the failure to comply with the statute and the inability of Petitioner to consent due to his condition after the accident. App. 460, l. 20-App. 462, l. 19. The State did not question Counsel Griffith regarding his failure to object to the admission of the blood toxicology results.

The State argued that the record was "abundantly clear" that Counsel Griffith had challenged the blood draw and results on multiple grounds. It claimed that the finding of consent was unchallenged because Petitioner did not testify at the suppression hearing and thus there was no valid Fourth Amendment argument that Counsel Griffith could have made. App. 472, l.6-App. 473, l. 1. Counsel Falk argued that without having preserved the objection to the blood draw and results that Counsel Griffith did not adequately challenge the blood draw. When the PCR court questioned whether characterizing the motion as *in limine* instead of a motion to suppress made any difference Counsel Falk responded, "as far as record preservation is

concerned, absolutely-absolutely no difference." App. 473, l. 21-App. 474, l. 4. The State responded that there was case law waiving preservation requirements when it related to Fourth Amendment issues and that there was no brief or evidence in the record that the issue was not preserved for appellate review. App. 474, ll. 5-14. Counsel Falk responded that there was no renewing objection when the evidence was entered at trial and that the testimony raised a question as to whether Petitioner could have consented to the blood draw based on his inability to remember anything from that time period. He argued the voluntariness of the blood draw was an issue that needed to be preserved for appellate review. App. 474, l. 16-App. 475, l. 1.

The PCR court ruled that Petitioner had failed to meet his burden of proof. The court found that Counsel Griffith had done an adequate job preparing and raising the issues and representing Petitioner. The PCR court requested the State prepare an order of dismissal. App. 475, ll. 6-21. The order of dismissal was filed on October 24, 2022. App. 477-495. Regarding Counsel Griffith's failure to challenge the blood draw and results, the PCR court ruled the claim was "directly refuted by the record, which conclusively establishes that trial counsel moved to suppress this evidence on several grounds..." and that the "motion was not denied based on any failure of counsel regarding argument or presentation, but rather, was based on the uncontradicted evidence presented establishing that Applicant unequivocally and unambiguously gave knowing, intelligent, and voluntary consent to give a blood sample." The PCR court found that Petitioner did not establish prejudice because he failed to show "that a motion to suppress would have been granted had counsel made additional arguments or that the issue would have been successful on appeal." App. 492-493.

ARGUMENT

The PCR court err in finding trial counsel provided effective assistance where counsel challenged the blood draw and results during a pre-trial suppression motion but failed to secure a ruling on both grounds argued in support of suppression and failed to object to the admission of the blood results during trial which precluded appellate review of the motion.

The record is this matter establishes that Counsel Griffith failed to adequately challenge the blood draw and results thereof. Counsel Griffith's argument for suppression was mainly based on the State's failure to comply with S.C. Code Ann. § 56-5-2950, which was not applicable to Petitioner because he was not under arrest at the time of the blood draw. Counsel Griffith did not adequately argue that Petitioner lacked the ability to voluntarily consent to the blood draw at the time it was taken and therefore the blood draw and results were a violation of Petitioner's Fourth Amendment rights. Further, Counsel Griffith did not object when two witnesses testified to the results of the blood draw which waived the issue for appellate review. This was ineffective assistance of counsel that prejudiced Petitioner.

The appellate courts of our state have repeatedly held that in most cases making a motion *in limine* to exclude or suppress evidence does not preserve the issue for appellate review because a ruling on a motion *in limine* is not a final determination. Therefore, the party challenging the evidence **must** make a contemporaneous objection when the evidence is introduced at trial to preserve the matter for review. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840(2001); State v. Wood, 362 S.C. 520, 526, 608 S.E.2d 435, 438-439 (Ct. App. 2004); State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010). Two exceptions to this rule exists. The first exception "is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of

evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021). The second exception to the contemporaneous objection requirement occurs "where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review." Id.

Neither of these exceptions applied to Petitioner's case. After moving pretrial to suppress the blood draw and results thereof, the State did not immediately move the to admit the evidence. Although the second witness, Trooper Boland, improperly testified that methamphetamine was found in Petitioner's system, the evidence was not admitted until much later in trial when Agent Selinsky testified. Further, Counsel Griffith did not make a constitutionally based argument against the suppression of the blood draw and results thereof but argued the State did not comply with the implied consent statute. Thus, based on the jurisprudence of our state, counsel was required to contemporaneously object to the admission of the blood draw and the results thereof to preserve the issue for appellate review and adequately challenge the issue below.

Accordingly, it is well settled that failure to preserve an issue for appellate review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel can be found deficient for failing to object, failing to place an argument on the record, failing to obtain a final ruling, or failing to proffer testimony. See Thompson v. State, 423 S.C 235, 814 S.E.2d 487 (2018); Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In the matter, *sub judice*, trial counsel was defective because he did not adequately move to suppress the blood draw, did not

make valid arguments in favor of suppression, such as Petitioner's inability to consent, did not obtain a final ruling on the grounds raised, and failed to contemporaneously object to the admission of the evidence. The main argument made by counsel regarding the implied consent statute was inapplicable to Petitioner's case as he was not under arrest at the time of the blood draw. While counsel mentioned that Petitioner denied giving consent and questioned Trooper Boland about his ability to communicate with Petitioner while he was medicated and suffering from a concussion among other injuries, he never once argued to the trial court that Petitioner lacked the ability to consent due to his mental state. The only party to raise consent was the State, which argued that the blood draw was admissible regardless of any argument concerning statutory applicability or compliance because Petitioner consented to the blood draw. Additionally, counsel did not request that the court rule on the issue of consent when it deemed the blood draw and results admissible.

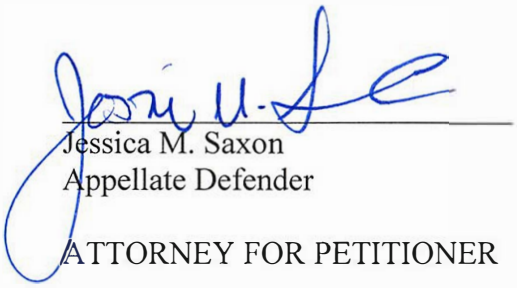
The language of the order of dismissal is misleading as the record reflects that counsel did not move to suppress on "several grounds" but on the sole ground of failure to comply with the implied consent statute. Additionally, there was no evidence that the ruling "was based on the uncontradicted evidence presented establishing that Applicant unequivocally and unambiguously gave knowing, intelligent, and voluntary consent to give a blood sample." In fact, the ruling of the trial court was that Counsel Griffith's argument that the State failed to comply with the implied consent statute was meritless because the blood draw occurred pre-arrest and thus the statute did not apply. The issue of Petitioner's ability to voluntarily consent to the blood draw was not properly argued and was not ruled upon. Further, the assertion that there was uncontested evidence of consent based on the testimony of Trooper Boland was refuted by the record which contained evidence of Petitioner's concussion, highly medicated state, and

memory loss. This was evidence which supported the contention that Petitioner lacked the ability to consent at the time of the blood draw and contradicted Trooper Boland's testimony.

Petitioner was prejudiced by counsel failures because the meritorious argument, that Petitioner lacked the ability to consent at the time the blood draw occurred, was not made to the trial court in any meaningful manner and the court did not rule on the issue of consent. Further, the arguments that were made were not preserved for appellate review because there was not a contemporaneous objection made to the admission of the blood toxicology results. The argument that was raised in support of suppression was entirely inapplicable to Petitioner's case and a finding that making a meritless argument adequately challenged the blood draw and results thereof by the PCR court was without support in the record. Petitioner has shown both deficient performance and resulting prejudice.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of this issue.



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This 30th day of August, 2023.