

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable Daniel Dewitt Hall, Circuit Court Judge

Case No. 2019-CP-29-00975
Appellate Case No. 2023-000404

Michael Brent Gay,

Petitioner,

vs.

The State of South Carolina,

Respondent.

REPLY

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S.C. SUPREME COURT

ARGUMENTS

I. Trial counsel's failure to develop and present evidence that the victim's death was the result of an accident constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel.

The State argues that the ruling of the PCR Court that trial counsel was not ineffective for not presenting any evidence that the victim's death was the result of an accident was correct because: (1) the Court found persuasive trial counsel's testimony at PCR that Petitioner did not mention a defense of accident until 10 days prior to trial, (2) Petitioner asserted in his 911 call that he was acting in self-defense and therefore trial counsel decided not to present more than one theory of defense, and (3) the pathologist stated the evidence did not support a defense of accident. Respondent's Return p. 9.

First, the PCR order states the PCR court found trial counsel's testimony to be persuasive and Petitioner's testimony to be unpersuasive over the issue of when exactly Petitioner requested his defense team pursue a defense of accident. Trial counsel stated it was roughly ten days prior to the start of trial while Petitioner testified it was from the very outset of their attorney/client relationship. PCR counsel attempted to introduce into evidence during the PCR hearing certain documents related to the fee dispute between Petitioner and trial counsel. These documents demonstrate that Petitioner did request a defense of accident from the beginning of representation and supported Petitioner's version of events. However, as discuss in argument four, the PCR court incorrectly ruled these documents were inadmissible and prevented Petitioner from presenting his full case at PCR. Additionally, even if the timeline is not clear, what is certain is that Petitioner did in fact request his trial counsel pursue the defense of accident at some point prior to trial.

While it is not ideal to change trial strategies ten days before trial is set to commence, it is not impossible, particularly for two attorneys as experienced as Petitioner's trial counsel. Additionally, trial counsel should have filed a motion for a continuance in order to have more time to prepare this defense, which they did not attempt to do. According to trial counsel's testimony, trial counsel made no attempt to present any sort of defense of accident other than calling the State pathologist to discuss the evidence prior to trial. This total lack of preparation of the defense requested by the Petitioner was ineffective assistance of counsel.

Second, the State argues that because Petitioner asserted in his 911 call that he was acting in self-defense, defense counsel was reasonable in not pursuing a strategy of presenting an accident defense and therefore not presenting the defense was not ineffective assistance of counsel. This ignores the fact that even if Petitioner made some assertions in his 911 call alluding to self-defense, trial counsel still could have pursued a defense of accident based off of Petitioner's testimony and account of the evening as well as the facts of the case. Petitioner testified he was heavily influenced by drugs at the time of this incident. The other people in his home, including the victim McManus, had also been drinking alcohol and using drugs throughout the day. Petitioner left McManus and Robert alone in his room while he went to speak to his grandmother. When he returned, Petitioner went into his closet and noticed his pills and a precious family heirloom was missing from his closet and then saw McManus holding his pocket knife with the blade out in the other room. He believed McManus stole his property and his drugs and was going to use a knife against him. Petitioner wanted to exit safely from the situation and grabbed his gun in case

he needed to defend himself. As he was leaving, he tripped and the gun accidentally fired. Both can be true; it does not have to be either/or. Petitioner was prepared to defend himself if he had to in order to get away from someone who he believed stole his property and drugs but in the process his gun accidentally discharged. Just because he made assertions on the 911 call referencing self-defense does not mean he was precluded from pursuing a defense of accident as well.

Finally, the State argues it was reasonable for trial counsel to not present a defense of accident because the State pathologist told trial counsel that the evidence did not support the theory of accident. At PCR, trial counsel testified the pathologist told him, “Mr. Delgado, the shot was absolutely horizontal, right to left, there was nothing that would indicate that there was an upward trajectory of the shot.” App. 224. Trial counsel continued to testify stating, “[t]hat, to me, didn’t agree with what Brent was trying to say about an accident.” App. 224. Trial counsel, not the pathologist, was the one who testified the evidence did not support a defense of accident. Trial counsel did not attempt to call another expert to get their thoughts on the evidence and it appears he did not ask the pathologist her ultimate opinion either but arrived at the opinion that a defense of accident could not be presented on his own.

Petitioner clearly communicated his desire to present this defense and his trial counsel failed to put up any sort of evidence regarding this defense at trial without a valid strategic reason as to why they decided not to follow their client’s wishes in his trial. Trial counsel provided ineffective assistance of counsel in violation of Petitioner’s Sixth Amendment right to counsel.

II. Trial counsel's failure to offer mitigating evidence regarding Petitioner's opioid addiction during his guilty plea constitutes ineffective assistance of counsel depriving Petitioner of his Sixth Amendment right to counsel.

The State argues the ruling of the PCR Court finding that trial counsel was not ineffective was accurate because trial counsel did present mitigating evidence regarding Petitioner's opioid addiction during his guilty plea and because Petitioner could not prove prejudice.

Pleading guilty to voluntary manslaughter is an extremely serious charge with a vast sentencing range under South Carolina law. According to trial counsel's testimony about his understanding of the plea, this was an open plea and the State was going to request the maximum sentence, meaning trial counsel believed the sentencing of Petitioner would be solely in the judge's hands and the State would be asking for the maximum sentence, thirty years. With that understanding, it was critical for trial counsel to present the most compelling mitigation evidence possible in order for Petitioner to have a chance at a lower sentence. The plea transcript is only twenty-one pages long with defense counsel's mitigation of the transcript as a mere five pages long. He did not present anyone to speak on Petitioner's behalf. Not even Petitioner's own grandmother who was present in the courtroom. None of the experts he had hired to evaluate Petitioner addressed the Court either. Trial counsel did reference Petitioner's drug problem, that he had retained experts to evaluate Petitioner, and the results of the reports, however he did not hand the reports to the judge and ask the judge to read them prior to sentencing and he had no one speak on Petitioner's behalf at all. He did the bare minimum.

This failure to present the mitigation evidence available to trial counsel at the time of Defendant's guilty plea was a deficient performance by trial counsel. That deficient performance prejudiced Petitioner. Petitioner received the maximum sentence on this charge during his guilty plea. The limited mitigation presented by trial counsel during the guilty plea did not lessen his sentence in the slightest. Trial counsel had access to much more mitigation he could have presented and failed to do so. This deficient performance prejudiced Petitioner.

III. Petitioner's plea was involuntary due to his lack of understanding of the elements of voluntary manslaughter and his belief he would receive a 12-year sentence.

The State argues that the ruling of the PCR Court finding that Petitioner's plea was voluntarily made was correct because of trial counsel's testimony at PCR that they had fully discussed the elements of the charges, rights Petitioner was waiving, and sentencing range to Petitioner.

Petitioner testified at PCR that by day four of the trial he thought the trial was going well and in his favor. Petitioner testified that during the recess on day four of trial, trial counsel told Petitioner, "Brent, if I was you, listen to me, I would plea. I have everything worked out for 12 years." App. 202. Petitioner further testified he did not know he could have received the maximum sentence because "there's no way that I would have ever entered an open plea and possibly run the risk of receiving a 30-year sentence...if that would have been something I had intended on doing, why would I have paid Mr. Delgado \$100,000 to represent me? I could have gotten those same results with a public defender

for free.” App. 204. Petitioner trusted his trial counsel he had hired, paid, and had a three-year relationship with when he entered his guilty plea.

Petitioner was not familiar with the process of pleading guilty when he entered the plea. Petitioner did not know that the victim’s family would be addressing the Court, or that the Solicitor and the investigator would be asking for the maximum sentence. Petitioner also testified that trial counsel told him the charge he was pleading guilty to was a parole-eligible offense, and it was only after he was sentenced that he learned it was not.

Yes, trial counsel testified he met with Petitioner twelve to fifteen times over the course of his representation. However, those meetings were in preparation for trial. There was no evidence that during these meetings trial counsel discussed the elements of voluntary manslaughter to Petitioner. Rather, on the fourth day of trial, during a recess from the trial, counsel met with Petitioner to discuss a plea to voluntary manslaughter. Petitioner did not understand the elements of the charge he pled guilty to after meeting with his lawyers on the day of his guilty plea for roughly one hour.

During the guilty plea itself, there was so little mitigation presented on behalf of Petitioner that that could have also supported Petitioner’s view that the sentence was decided already. If his plea was truly open and he could have been sentenced up to thirty years and his lawyers had not worked out an agreement with the State then why would his lawyers not have argued more, presented more, and put up more mitigation on his behalf in order to sway the judge to order a more favorable sentence?

Petitioner clearly testified at PCR that he thought the trial was going well at the point in time that his attorney talked to him about the guilty plea and his lawyer’s

assurances about things that were not true were the only reason he pleaded guilty. Otherwise, he would have continued with his trial, which was already in progress. Trial counsel was ineffective because his deficient performance prejudiced Petitioner.

IV. The PCR court erred in barring counsel from introducing evidence regarding Petitioner's fee dispute with trial counsel when evidence contained in the paperwork supported Petitioner's testimony that Petitioner informed trial counsel at the beginning of the case that the shooting was accidental.

The State argues that the PCR Court's decision to prevent the fee dispute documents from being admitted in evidence was correct because they were not relevant. "Relevant evidence means evidence having any tendency to make the existence of **any** fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." South Carolina Rule of Evidence 401 (emphasis added). The documents were relevant for several reasons: to demonstrate that Petitioner intended to pursue a defense of accident from the onset of his relationship with trial counsel, to demonstrate Petitioner's credibility to the PCR Court, to show Petitioner intended his case to be a full trial, all the way to a verdict (as articulated by PCR counsel arguing for its admission during the hearing). To deny PCR counsel an opportunity to argue that point, admit the documentation in evidence for the Court to review to make its credibility determination of the witnesses, and to prevent PCR counsel from cross examining trial counsel about the documentation was in error and prevented Petitioner from having a full and fair PCR hearing. This ruling was erroneous.

CONCLUSION

Respectfully, Mr. Gay asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,
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