STATE OF SOUTH CAROLINA

In the Supreme Court

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Oct 25 2023

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Eugene C. Griffith, Circuit Court Judge

Case No.: 2020-001435

Mykel Johnson, #351916,

Petitioner,

vs.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

Did the post-conviction relief court err in finding that trial counsel's failure to object to testimony that commented on Petitioner's right to remain silent was ineffective assistance of counsel?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. It is alleged that on October 28, 2011, Petitioner fired a weapon at a car occupied by Frank Babecki and Desiree Constantineau, resulting in two counts of attempted murder. These were indicted at the December 2011 term of the Beaufort County Grand Jury as 2012-GS-07-02269 and -02270. Petitioner went to trial before the Honorable Carmen T. Mullen and a jury where he was represented by Erick Erickson, Esquire. On June 20, 2012, the jury convicted Petitioner as indicted and he was sentenced to concurrent fifteen-year sentence for each count of attempted murder.

A timely notice of appeal was filed and was later perfected by Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense. She filed an *Anders*[1] brief and a petition to be relieved as counsel. On April 2, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences and granted appellate counsel's petition to be relieved. *State v. Johnson*, 2014-UP-134 (filed April 2, 2014). This was not appealed to the Supreme Court, and remittitur issued April 18, 2014.

Petitioner filed a timely application for post-conviction relief on July 21, 2014. Within, he claimed he was entitled to post-conviction relief because his "lawyer didn't probably [sic] represent him at trial." The State filed a return and requested an evidentiary hearing on the ineffective assistance of counsel argument. This hearing was held on May 17, 2016 at the Beaufort County Courthouse. The Honorable Brooks P. Goldsmith presided, while James K. Falk, Esquire represented Petitioner and J. Rutledge Johnson, Esquire represented the State.

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[1] *Anders v. California*, 386 U.S. 739 (1967).

Evidence adduced at the hearing led to Petitioner proceeding on his ineffective assistance claim by arguing that trial counsel should have objected to hearsay testimony from Office Dowling and should have objected to Officer Dowling's testimony regarding Petitioner's right to remain silent.

After the hearing, Judge Goldsmith denied the application and dismissed the action with prejudice by signed order on June 20, 2016. Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, arguing Judge Goldsmith erred by applying the incorrect standard to reject Petitioner's claims regarding ineffective assistance of counsel. Respondent filed a return, and Judge Goldsmith denied the motion.

A timely notice of appeal was filed, which was perfected by Susan B. Hackett, Esquire of the South Carolina Office of Appellate Defense via filing of a brief to the Supreme Court. This brief raised two main issues:

I. Did the PCR court err in concluding as a matter of law that [Petitioner's] claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of the South Carolina Code because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to *Anders v. California*, 386 U.S. 739 (1967)?

II. Did trial counsel render ineffective assistance in abrogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to a police officer's testimony that [Petitioner] invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights?

Respondent filed a return that conceded error in the post-conviction relief court's rejection of the first issue. Thereafter, the case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR, which granted certiorari. Following briefing and oral argument, the Court of Appeals issued an order reversing and remanding the matter back to trial court, holding that the post-conviction relief court erred in denying Petitioner's allegation on procedural

grounds. The State filed a motion for rehearing on February 20, 2020 attempting to clarify the confines of the remand. Petitioner filed a return and the motion was denied on April 23, 2020. Remittitur issued June 24, 2020.

Back at the trial court level, Petitioner filed an amendment post-conviction relief application on July 29, 2021 through counsel Tommy A. Thomas, Esquire. This included new allegations of

1. Ineffective assistance of trial counsel for
    a. Failure to object to Officer Dowling's testimony regarding Applicant's decision to exercise his right to remain silent and
    b. Failure to object to any mention of implied malice due to use of a firearm, including *Belcher* implied malice charge.

Petitioner sought for the conviction to be overturned on ground of illegal search and seizure and *Miranda*[2] rights violation, or vacated on the grounds of ineffective assistance of counsel.

A hearing on the merits was convened at the Beaufort County Courthouse on August 9, 2021 before the Honorable Eugene C. Griffith, Jr. Tommy A. Thomas, Esquire continued to represent Petitioner and Samantha J. Weidauer of the Attorney General's Office represented the State. In opening, the State moved to limit Petitioner's allegations and argument to solely that of the issue on remand, being Officer Dowling's testimony. PCR counsel agreed this was beyond the scope of the remand, but asked for the court to consider it, regardless. The court declined to hear it, finding it was beyond the scope of remand.

After hearing testimony and reviewing records provided in the case, Judge Griffith issued an order denying relief to Petitioner on September 6, 2023. It was filed September 14, 2023. Notice of appeal was filed September 27, 2023, and this petition for writ of certiorari follows.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-181, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, at 180-181, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court erred in finding that trial counsel's failure to object to testimony that commented on Petitioner's right to remain silent was ineffective assistance of counsel.

A major tenet of both the United States and South Carolina Constitutions is a criminal defendant's right not to testify against themselves or incriminate themselves during a trial. See U.S. Const. amend. V; S.C. Const. art. I, § 12. One way this right is protected is the issuance of *Miranda* warnings that notify an accused of their right to remain silent, among other constitutional protections. This right is extended into the courtroom through opinions such as *Griffin v. California*, 380 U.S. 609 (1965), *Doyle v. Ohio*, 426 U.S. 610 (1976), and *U.S. v. Hale*, 422 U.S. 171, 95 S.Ct. 213 (1975), which all hold that any commentary on a defendant's silence essentially negates the accused's right not to testify. For the court to allow any testimony or questioning regarding a defendant's silence at any time "would be fundamentally unfair and a deprivation of due process," as it may be used to impeach other information adduced at trial. *Doyle*, 426 U.S. at 618, 96 S.Ct. at 2245.

South Carolina has ensconced such protections in its own case law that reiterates the sacrosanct, constitutional protection of the right to remain silent. These cases were clearly outlined in the post-conviction relief court's order to include *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000); *McFadden v. State*, 342 S.C. 637, 539 S.E.2d 391 (2000); and *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). The *Edmond* court summed up this line of jurisprudence by holding that, "[t]he obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and

federal constitutions. Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged." 341 S.C. at 346, 534 S.E.2d at 685 (citing *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)).

However, instead of comparing the matter at bar to the facts in *Edmond* – a similarity to which this argument will return – the post-conviction relief court lists of cases that differentiate when or when not commentary regarding a defendant's silence is permissible. The court notes, "Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial." *Gill v. State*, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001). In this post-conviction relief matter, Petitioner argues that such testimony was adduced and deprived him of a fair trial specifically because of his trial counsel's failure to object to it. As noted in *McFadden*, the defendant then takes on the burden of proving that this testimony and/or actions surrounding it were prejudicial to him.

Such an incident, when commentary is made about a defendant's silence, has become known as a *Doyle* violation after the Supreme Court of the United States' opinion of the same name. South Carolina has developed factors that help to guide the inquisition as to whether commentary at trial violates *Doyle*'s prohibitions. Those listed in *Edmond* are as follows: "Such an error will not be deemed prejudicial when the record shows the reference to the defendant's right to silence or to an attorney was

a single reference, which was not repeated or alluded to;

the prosecutor did not tie the defendant's exercise of his right directly to his exculpatory story;

the exculpatory story was totally implausible;

and the evidence of guilt was overwhelming."

Edmond, 341 S.C. at 348, 534 S.E.2d at 686-87.[3] The post-conviction relief court found that these factors weighed in favor of the State and, as such, Petitioner could not meet the burden of proving the requisite prejudice to justify relief. Petitioner, clearly, disagrees with the court's findings and argues in the contrary.

The initial factor asks whether references to a defendant's silence were single or multiple. Initially, Applicant has not conceded this factor, contrary to the post-conviction relief order. Though Petitioner originally proceeded on the statement by Officer Dowling, the State brought up a second statement during the merits hearing. As evidenced in the transcript from the most recent post-conviction relief hearing and borne out by the trial transcript, there were two references to Petitioner's silence during testimony by police officers. The first reference is on trial transcript page 103 where Officer Dowling states, "Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information." (App. p. 103, lines 13-16) The second reference is on page 142 of the trial transcript where Officer Erdel is asked "...did he ask you any questions about what you're wanted for?" Erdel responded, "No." He is then asked, "But he did indicate that he would have turned himself in and got a lawyer, correct?" Erdel's response is, "That's what he said." (App. p. 142, lines 12-17) These are both clearly reference to Petitioner's repeatedly stated desire to remain silent. Further, Dowling's comment about "not developing any information" can be interpreted as having a negative connotation, thus compounding the prejudice against Petitioner.

[3] The *Edmond* court noted that these factors are the same ones analyzed on direct appeal in deciding whether a similar error is harmless beyond a reasonable doubt.

The second factor is whether the State tied Petitioner's exercise of this right to an exculpatory account. This has not and will not be conceded by Petitioner. Petitioner's defense was one of alibi, namely that he was making music with friends on Lady's Island on the day of the shooting. In this paragraph of the order, the court notes that it was allowable for the prosecution to comment on Petitioner's pre-*Miranda* silence. From the transcript, however, it is unclear at best when these statements were made and whether they were repeated.

From the two law enforcement officers' testimony, it seems that Petitioner did make a pre-*Miranda* statement regarding waiting to get a lawyer before he turned himself in. The reference in the State's closing argument to this is not a *Doyle* violation. This was not the only time the State introduced evidence regarding Petitioner's silence, though. In questioning both Officer Dowling and Erdel, the State elicited testimony about Petitioner's choice to remain silent. Officer Dowling is specifically asked what additional evidence he was able to obtain after taking Petitioner into custody, to which he responds Petitioner did not want to talk. (App. p.103, lines 10-16) This is quite a different statement of facts than what is laid out in the post-conviction relief court's order.

Further, though, the State ties Petitioner's desire to remain silent to his alibi defense in closing argument. On pages 273-275 of the trial transcript, the prosecutor comments on Petitioner's silence and implies that it is evidence of a guilty mind because he did not respond to a text from the victim. (App. p. 274, lines 1-6) He then immediately begins to discredit Petitioner's alibi defense as presented by Simmons. He even states, surprisingly, that it is completely plausible Petitioner got to the home on Lady's Island where Simmons saw him.

(App. p.275, lines 6-8.[4]) This passage as a whole is a clear attempt at inappropriately connecting Petitioner's silence to a weak alibi.

Third is the question of whether the exculpatory story was totally implausible. While the prosecution argued it was, other than the statement mentioned immediately above, Petitioner and his trial counsel maintain that it was absolutely plausible. Kendalle Simmons testified on Petitioner's behalf that he had seen Petitioner at a friend's house on Lady's Island around 3:00 p.m. (App. p. 248 lines 24-25 p. 249, lines 1-9) When Simmons arrived, Petitioner was already at the home enjoying some music. If the shooting occurred as late as 2:00, it is not at all implausible to surmise that Petitioner was at the home during the time of the shooting. Simmons further testified that, to his knowledge, Petitioner did not own a gun as he had never seen one in Petitioner's possession. (App. p. 258, lines 1-7) Though Simmons was ultimately wrong about Petitioner's gun ownership, this testimony does not cast doubt on his overall credibility as he testified to the best of his knowledge.

The order goes on to mention a text message sent by one of the victims to Petitioner, in which the victim accuses Petitioner of the shooting. Petitioner does not respond, which plausibly creates another instance of pre-*Miranda* silence on which the State should not comment. This is less clear, as it is not a statement to law enforcement. Regardless, the post-conviction relief order improperly characterizes this as an admission of guilt. The language referenced in *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) is dicta in which the court is comparing scenarios. It is not a holding or finding of fact and, as such, is improperly used in this context to bolster the State's case. The order further cites case law in ways that are not completely in line with the

[4] Petitioner admits this may be a misstatement on the part of the prosecutor, but argues it is unclear what else he may have meant to say.

actual holdings. The line from *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) is actually tempered in the opinion by the finding that "prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result." *Id.* This is directly applicable to the case at bar because Petitioner did not testify and, as such, it is very difficult to impeach his credibility. Also importantly, the South Carolina case cited speaks to a witness's failure to come forward with exculpatory information and, as such, cannot be analogized to this case.

The last element is regarding the existence of overwhelming evidence of guilt against a defendant. Petitioner avers that the court's characterization of the facts of the trial are overly friendly to the State's position. There is the initial fact that the only witnesses were the victims, who made cross-racial identifications from a moving vehicle. The order finds that he "consistently acted with a guilty conscience," evidenced by leaving his home and asking police how they found him. (App. p. 545, line 14) The court's characterization of Simmons and his testimony is addressed above, and can hardly be deemed "completely unreliable and unbelievable." (App. p 545, lines 18-19). These elements combined cannot be called overwhelming by any stretch. There is no forensic evidence, no ballistic evidence, no unbiased witnesses, and no confession.

We have also been cautioned by the Supreme Court when it comes to the finding of overwhelming evidence in post-conviction relief cases. In *Smalls v. State*, *supra*, the court held that a showing of overwhelming evidence of guilt sometimes, but only rarely, will preclude the need to prove prejudice in that, but for counsel's errors, the outcome of a trial would have been different. The facts in *Smalls* that were characterized as overwhelming include a witness who "saw him pretty well," evidence of flight, and a matching fingerprint on the weapon used in the

crime. *Id.*, 422 S.C. at 192-93, 810 S.E.2d at 845-46. These, which are stronger than the facts *sub judice*, were held to not be overwhelming. Further, the court held that "[w]hen potentially strong evidence such as the fingerprint and Green's identification is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." *Id.*, 422 S.C. at 194, 810 S.E.2d at 846.

Though *Smalls* does not deal with a *Doyle* violation, it is very helpful in the type of analysis that should be used in post-conviction relief cases when considering whether evidence is overwhelming. We can use this guidance to show that the facts in this case are not overwhelming, certainly not enough to preclude a possible finding of prejudice by trial counsel. When combining this fact with the discussion above as to the actual prejudice Petitioner suffered by the commentary on his silence, it is not possible to conclude that these factors weigh against Petitioner when considering whether a *Doyle* violation occurred.

We can also, on balance, compare the facts in this case with those in *Edmond, supra*. It was a case with only circumstantial evidence (other than the testimony of a single biased witness), a plausible defense, and failure of defense counsel to object when the State commented on the defendant's right to remain silent and be represented by counsel. Like in this case, trial counsel testified he did not know why he did not object to this commentary. The commentary was in a form similar to ours, where law enforcement said, "I did pull him out [of jail] the next day to interview him. However, he invoked his right to counsel." *Id.*, 341 S.C. at 343-44, 534 S.E.2d at 684. In closing, the State remarked that after arrest, he invoked his right to counsel, "smartly enough." *Id.*

The *Edmond* court applied the same factors considered here and found prejudice with nearly identical facts. There are multiple references to his silence until he had a lawyer.

Immediately after commenting on this silence, the prosecutor commented on Edmond's defense, which tied the exercise of the right to a plausible exculpatory story. Lastly, evidence of guilt was not overwhelming. Compare that to the case at bar. There are clearly multiple references to Petitioner's silence until he has a lawyer. After commenting on that silence, the State, in closing, immediately begins discrediting Petitioner's alibi defense, which is plausible. (App. p.273-275) Lastly, it is clear that evidence of guilt was not overwhelming.

The balance of these factors shows that Petitioner was prejudiced by trial counsel's failure to object to the mentions of Petitioner's silence and right to counsel because the result of the trial probably would have been different had he done so. As such, the order of the post-conviction relief court must be overturned and Petitioner's sentence must be vacated.

CONCLUSION

This Court must overturn the post-conviction relief court's order and vacate Petitioner's sentence.

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October 25, 2023