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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
The Honorable Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2023-000730

EDWARD WASHINGTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE

The PCR court properly found that counsels were not ineffective for failing to object to the admission of photographs because their probative value was not substantially outweighed by the danger of unfair prejudice.

STATEMENT OF THE CASE

Petitioner Edward Washington was indicted by a Horry County Grand Jury in February of 2017 for leaving the scene of an accident resulting in death and felony driving under the influence, death results. He proceeded to a jury trial on June 3-6, 2019, before the Honorable Stephen H. John, circuit court judge, presiding. Petitioner was acquitted of leaving the scene of an accident, but found guilty of felony driving under the influence and sentenced to twenty years' incarceration. Petitioner's appeal was dismissed pursuant to Anders. Petitioner filed an application for post-conviction relief on January 10, 2022. His PCR hearing was held on January 3, 2023, with the Honorable Debra McCaslin, circuit court judge, presiding. Petitioner's application was dismissed with prejudice. This appeal follows.

STATEMENT OF FACTS

On October 28, 2016, Ryan Bielawa (Victim), a nineteen-year-old Coastal Carolina student, went out to celebrate Halloween. (App. 200-1). He and a group of friends decided to walk to the dining hall for a late-night snack. (App. 177). The group walked up the sidewalk along highway 544. (App. 177). Before reaching the crosswalk, Ryan parted from the group and attempted to cross the highway. (App. 177). While attempting to cross the highway, Ryan was struck and killed by Petitioner's vehicle. (App. 177).

Kelcee Cramer, a nursing student, witnessed the event. (App. 182-3). She was not friends with Ryan but was near the collision at a Cricle K on the night of the incident. (App. 183). She testified that she was waiting to pull out when she saw Petitioner's vehicle. (App. 187). She stated that Petitioner's car "came a lot faster than [she] thought" that it would. (App. 187). The posted speed limit for the area was forty miles per hour. (App. 265; 411). She established that Ryan was crossing the street when the car hit him. (App. 187). She estimated Ryan went twenty-five to thirty feet in the air due to the impact. (App. 188). She said petitioner was going "fast, really fast." (App. 188). She estimated Petitioner was traveling around sixty-five miles per hour. (App. 188). She stated that after hitting Ryan, Petitioner did not stop or even hit his brakes. (App. 189). After the collision, Cramer ran to Ryan and waited with him until law enforcement arrived. (App. 188-9).

Olivia Mallee, a Coastal Carolina student, testified she was walking in the group with Ryan when the collision occurred. (App.176-7). She stated she saw Ryan's shoe fly and what she thought was his shadow. (App. 177). She then saw Ryan was injured and ran across the highway. (App. 177). She held Ryan's head while others wrapped his wounds and performed CPR. (App. 177-8).

A few minutes later, Petitioner came back to the scene and was “belligerent” and “absurd.” (App. 190). A witness stated Petitioner returned to the scene with a broken windshield, swung open his car door, and said “who threw that bottle at my fucking car, who threw it, who threw it?” (App. 211). Mallee stated he was fighting random people outside the gas station. (App. 190). At this point Officer Baker arrived to the scene and detained Petitioner because Petitioner was “actively swinging and punching people.” (App. 167).

Other officers and EMS arrived at the scene. (App. 169). At that time, Ryan was surrounded by a group of people attempting to help. (App. 151). Upon their arrival they noticed Ryan appeared to be deceased. (App. 152). Ryan had a diagonal cut across his chest where fat was coming out of his stomach. (App. 125).

Officer Guyett presumed Petitioner was intoxicated because his eyes were red and glossy, and Petitioner was taken into custody. (App. 241). Petitioner was taken to the hospital where they tested his blood alcohol level, which was 0.239. (App. 399).

The state admitted photographs of Ryan’s body in the condition found. (App. 153). Officer Soucy explained that the photographs showed the injuries sustained to the chest, stomach, face, hand, wrist, and legs. (App. 152). Neither of Petitioner’s attorneys made an objection to the admission of these photographs. (App. 153-5).

At trial, Dr. Proctor testified that Ryan’s cause of death was the impact of the vehicle. (App. 315). Proctor also testified that Ryan’s injuries were caused by a severe impact and that they were consistent with being struck by a vehicle. (App. 315-16). The jury acquitted Petitioner of leaving the scene of an accident but found him guilty of driving under the influence.

Petitioner testified at the PCR hearing that he thought Counsels were ineffective for failing to object to the admission of the photographs. (App. 568). Petitioner stated when it came to speeding “there was little to no evidence.” (App. 567).

Petitioner’s lead counsel, Jim Stanko, testified that the strategy of the defense was to emphasize that the Victim had a .187 BAC, did not cross the street at a crosswalk, was wearing dark clothes, and that Petitioner came back to the scene. (App. 602). Stanko did not object to the admission of photographs. (App. 603). Petitioner’s other attorney, Clay Pinkerton, testified that he did not think the photographs were inadmissible. (App. 614). He also testified that the photographs did not change the trial or strength of Petitioner’s case. (App. 615).

The Assistant Solicitor, who prosecuted the case, testified that the photographs depicted how Victim’s body was left at the scene. (App. 631). He stressed that the photographs also corroborated testimony relating to the speed of the vehicle and how Victim was thrown out of his shoes. (App. 631). The solicitor explained that the State needed to prove a violation of a traffic law and that here the photographs were evidence of the fact that Petitioner was speeding. (App. 631).

The PCR court denied Petitioner’s application for post-conviction relief. (App. 683). Specifically, the court found Counsels were not deficient for failing to object to the admission of photographs because the probative value was not substantially outweighed by the danger of unfair prejudice. (App. 677). The court noted that the photographs were a crucial piece of evidence used to substantiate the claim of speeding. (App. 677-8). The court found that Counsels had no “legitimate basis to object.” (App. 687). Lastly, the PCR court found that Petitioner did not establish prejudice because there was overwhelming evidence of guilt. (App. 678). The court

specifically noted Petitioner's BAC reading of .239, multiple eyewitnesses, GPS monitored speeds of up to 80 MPH, and that Petitioner returned to the scene. (App. 678).

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, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed de novo without deference to the lower court. Id.

ARGUMENT

The PCR court properly found that counsels were not ineffective for failing to object to the admission of photographs because their probative value was not substantially outweighed by the danger of unfair prejudice.

Counsels were not ineffective for failing to object to the photographs of Victim, because while they were gruesome, they assisted the jury in determining the disputed matter of whether Petitioner committed a traffic violation. Even if Counsels were deficient, their failure to object did not prejudice Petitioner, because a different outcome is not reasonably probable given the other evidence of Petitioner's speeding. Accordingly, this Petition for Writ of Certiorari should be denied.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 686 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCF ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence"). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. Strickland, 466 U.S. at 688-89. The benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. Id. 466 U.S. at 686. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 141 U.S. 2405, 2410 (2021).

Second, counsel's deficient performance must have prejudiced the petitioner so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697).

"Probative value is the measure of the importance of that tendency to the outcome of a case." United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007). It is the weight that a piece of evidence will carry in helping the jury make a determination. "The more essential the evidence, the greater its probative value." Id.

"All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Bratschi, 413 S.C. 97, 115, 775 S.E.2d 39, 49 (Ct. App. 2015). Evidence that is unfairly prejudicial is evidence that suggests a decision on an improper basis. State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

The Court of Appeals has upheld the admission of autopsy photos on several occasions over defendants' Rule 403, SCRE objection. See State v. Dial, 405 S.C. 247, 259, 746 S.E.2d 495, 501 (Ct. App. 2013) (finding no abuse of discretion where court admitted autopsy photos when the expert "testified the photographs would aid in her testimony"); State v. Jarrell, 350 S.C. 90, 106–07, 564 S.E.2d 362, 371 (Ct. App. 2002) (affirming admission of autopsy photos that "corroborated ... the pathologist's testimony regarding the extent of th[e] injuries"); State v. Thompson, 420 S.C. 192, 215, 802 S.E.2d 623, 635 (Ct. App. 2017) (affirming admission of autopsy photos that helped the jury understand the nature and extent of Victim's injuries as well as his condition near death); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008) (Autopsy photos of homicide by child abuse victim's internal organs and other injuries were admissible to corroborate doctor's testimony about various injuries inflicted).

In State v. Collins, the State introduced gruesome photographs that depicted the way in which victim was mauled by dogs. State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) (plurality). Collins was charged with, among other things, owning a dangerous animal causing injury to a person. Id. The plurality found the photographs aided the jury in evaluating the testimony offered by both parties. Id. 409 S.C. 524, 536, 763 S.E.2d 29. In a concurring opinion, Justice Kittredge found the admission to be a harmless error. State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) (Kittredge, J., concurring). The plurality noted the photographs depicted dog bites that jurors likely would be unfamiliar with. Id. 409 S.C. 524, 536, 763 S.E.2d 29. The photographs assisted the jury in establishing the elements of the offense charged and the extent of the injuries sustained. Id. The Collins plurality noted "[c]ourts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury." Id. 409 S.C. 524, 535, 763 S.E.2d 28.

The Indiana Supreme Court has upheld the admission of autopsy photographs of victim's body after being hit and beaten by a train. Wheeler v. State, 749 N.E.2d 1111, 1115 (Ind. 2001). The Wheeler Court noted that gory photographs may be admissible if they are relevant to a material issue. Id. The court found that the photographs assisted the jury in understanding expert opinion related to the injuries sustained and determining the cause of death. Id.

Likewise, the Appellate Court of Illinois upheld the admission of photographs that depicted a decedent. People v. Brown, 231 N.E.2d 262, 266 (Ill. App. Ct. 1967). At trial, defendant attempted to show victim's death was caused by an automobile accident. Id. The court found the photographs had probative value because they supported the medical testimony that victim's death was caused by severe blows to the head, not an automobile accident. Id. The court upheld the admission because the photographs aided the jury in their ability to understand the medical testimony and injuries sustained. Id.

Here, Counsels were not deficient because the photographs show the nature of the injuries sustained and also aid the jury in determining a material matter of controversy. The photographs introduced were undoubtedly graphic, but that alone does not render them inadmissible. State v. Holder, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (stating "[a]lthough the photographs were graphic, the facts in this case were graphic" and affirming the trial court); Turnipseed v. State, 367 S.E.2d 259, 262 (Ga. App 1988) (stating "the photographs were not devoid of probative value because they showed the nature of the attack on the victim"). The photographs depict the nature of Victim how he was found at the scene. (App. 153). While the photographs are gruesome, the facts of this case are gruesome. As noted in Collins, courts often deal with disturbing facts; disturbing facts alone should not prevent a jury from considering important evidence.

Not only do the photographs assist the jury in understanding the injuries sustained, but they also corroborate testimony given during trial. The photographs corroborate Kelcee Cramer's testimony that the vehicle was traveling really fast, and that Victim was flown twenty-five feet in the air. (App. 187-8). They also corroborate Olivia Mallee's testimony regarding how Victim was "flown out of his shoes." (App. 177). Again, they also corroborate the testimony of EMS workers in showing the degree of injuries Victim sustained. (App. 125). The court did not abuse its discretion because the photographs carry inherent probative value in their ability to corroborate testimony.

Lastly, the photographs aided the jury in their determination over whether or not Petitioner was speeding at the time of the incident. The State was required to prove Petitioner committed some type of traffic violation or neglected a duty imposed by law, namely that Petitioner was speeding when he hit Victim. (App. 144; 440). At the PCR hearing, Petitioner stated there was little evidence he was speeding. (App. 567). The State even noted in its closing argument that showing Petitioner was speeding was the "battleground" of the case. Cf. State v. Heyward, 441 S.C. 484, 501, 895 S.E.2d 658, 667 (2023) (affirming the admission of autopsy photographs which aided the jury to determine a material dispute). The injuries sustained show Petitioner was traveling above the posted speed limit of forty miles per hour.

Petitioner contends that any probative value is substantially outweighed by the danger of unfair prejudice. Here, the photographs contain probative value in that they depict the injuries sustained, corroborate testimony, and concern a material dispute. As The Court of Appeals noted in Bratschi "[a]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Bratschi, 413 S.C. 97, 115, 775 S.E.2d 39, 49 (Ct. App. 2015). Here Counsels cannot be said to have deviated from the reasonable standard of professional norms because any

danger of unfair prejudice does not substantially outweigh the probative value of the photographs.

Here, even if counsels deviated from the standards of professional norms, any deficiency did not result in prejudice. The standards of prejudice do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland v. Washington, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97. To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001).

Even if Counsels were deficient, a different outcome is not reasonably probable. A different outcome cannot simply be conceivable, it must be substantial. Harrington v. Richter, 562 U.S. 86, 111-12 (2011). The State proved its case by showing Petitioner's vehicle struck and killed Victim, Petitioner tested for a blood alcohol level of 0.239, and that Petitioner was traveling "fast, really fast" when he struck Victim. (App. 177; 399; 188).

As noted by the State in its closing argument, the "battleground in this case was whether or not Petitioner committed a traffic violation, namely whether he was speeding. (App. 441). The posted speed limit for the area was forty miles per hour. (App. 265; 411). The State produced witness testimony that Petitioner was traveling "fast, really fast" and she estimated that Petitioner was traveling sixty-five miles per hour. (App. 177). The State also produced evidence

that the collision caused Victim to be thrown eighty-five feet. (App. 362). Petitioner guessed he was traveling forty-five miles per hour, over the posted limit. (App. 273). Lastly, the State produced evidence that showed Petitioner reached seventy-nine miles per hour earlier in the night. (App. 323). Petitioner has failed to meet his burden in establishing a different outcome is reasonably probable. Accordingly, this Petition for Writ of Certiorari should be denied.

CONCLUSION

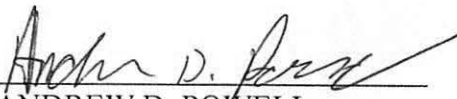
For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

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