STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

SHANA ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-002216

BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ISSUE PRESENTED

Whether the post-conviction court erred by finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert in forensic toxicology, where Bennett unexpectedly testified petitioner would have had a five to ten percent "impairment rate" at the time of the accident, which was directly counter to petitioner's defense that she was not impaired, where defense counsel admitted the state "completely destroyed [Bennett] on cross-examination," where Bennett also acknowledged his license expired in 1999, and that the Board of Pharmacy had issued him a cease and desist order to stop holding himself out as a registered pharmacist, since it was defense counsel's failure to adequately investigate Bennett's background which led to this "horrible" trial debacle?

STATEMENT OF THE CASE

Petitioner was indicted at the April 15, 2014, term of the Berkeley County Grand Jury for the offense of felony DUI causing death. App. 1233 – 1234. After petitioner had turned down the fifteen-year plea offer, her case was called to trial on June 2, 2014, before the Honorable Deadra L. Jefferson, and a jury. Aaron C. Mayer represented petitioner. Mason West and Bryan Alfaro were the assistant solicitors. App. 1. Defense counsel Mayer was later suspended from the practice of law after the trial in this case but before the post-conviction relief hearing.[1]

Petitioner was found guilty of felony driving under the influence on June 6, 2014. App. 1122. Judge Jefferson sentenced petitioner to seventeen years imprisonment. App. 1140.

Petitioner's conviction was affirmed on direct appeal when the Court of Appeals filed an opinion dismissing the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). See State v. Robinson, 2016-UP-036 (filed January 20, 2016).

Petitioner filed an application for post-conviction relief on February 5, 2016. App. 1143-1149. The state filed a return dated June 13, 2016. App. 1150-1154.

A post-conviction relief hearing was held before the Honorable Michael G. Nettles on October 1, 2018. Lance S. Boozer represented petitioner. Johnny E. James, Jr., was the assistant attorney general. App. 1155. An order of dismissal dated December 5, 2018, was filed. App. 1211-1232.

Petitioner filed a petition for a writ of certiorari with the South Carolina Supreme Court on July 31, 2019. The state filed a return to this petition. The Supreme Court ordered petitioner's case transferred to this Court in its order dated January 7, 2020. This Court granted the petition for writ of certiorari in its order dated November 23, 2021.

This brief of petitioner follows.

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[1] In the Matter of Aaron Cole Mayer, 2018-08-24-01 (August 24, 2018).

STANDARD OF REVIEW

"This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Questions of law are reviewed *de novo*, and we will reverse the PCR court's decision when it is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). No deference is given to the PCR court on questions of law. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839-40 (2018).

ARGUMENT

The post-conviction court erred by finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert in forensic toxicology, where Bennett unexpectedly testified petitioner would have had a five to ten percent "impairment rate" at the time of the accident, which was directly counter to petitioner's defense that she was not impaired. Defense counsel admitted the state "completely destroyed [Bennett] on cross-examination," where Bennett also acknowledged his license expired in 1999, and that the Board of Pharmacy had issued him a cease and desist order to stop holding himself out as a registered pharmacist, since it was defense counsel's failure to adequately investigate Bennett's background which led to this "horrible" trial debacle.

Introduction

The indictment alleged that in addition to being under the influence of alcohol, drugs, or both, petitioner was speeding, and/or crossed the center line, and/or failed to maintain her proper lane. App. 1233. The state's theory of the case was that petitioner was speeding, that she crossed the center line, and hit the decedent while driving impaired.

Petitioner's defense was that she was not impaired. She had several lay witnesses swear under oath at trial that petitioner was not impaired after a couple of drinks over more than three hours on the night of the accident. Further, petitioner had driven on this road many times before, she knew the speed limit was 45 mph, and she was well aware of the curve in the road where the accident occurred.

Relevant facts

Aaron Mayer was the civil attorney for petitioner's family at the time of the accident, and he represented petitioner in the felony DUI causing death criminal trial in this case. The automobile accident and petitioner's "arrest date was November 10, 2011." App. 1163, ll. 3-18.

This accident happened on a Thursday and Mayer was talking with petitioner in the hospital the next day, Friday. App. 1163, ll. 10-18.

Petitioner said as she talked "through everything" with Mayer, "it was our understanding that with all the evidence that was -- that was showing up, that I wouldn't see a day of jail time." App. 1164, ll. 5-13. Petitioner said she had no idea at that time what potential sentence she was facing for DUI causing death. She later learned she was facing up to twenty-five years' imprisonment. App. 1164, ll. 5-18.

Petitioner and defense counsel Mayer agreed that petitioner should turn down a fifteen-year plea offer because Mayer told her "you'll never see any jail time." App. 1165, l. 15 – 1166, l. 6. Mayer later testified at the PCR hearing: "I felt very strongly that the state would not be able to carry its burden. And I obviously led her wrong -- led her astray in that and I'm very, very sorry about that. I sincerely believed that between those *three factors*, I just didn't see how they could convict her." App. 1190, l. 20 – 1191, l. 21.

Mayer explained that the three factors were that the victim was allegedly talking on her telephone at the time of the collision, and she had her dog inside the car with her. Both of these were "distractions" that defense counsel hoped the jury would latch onto in somehow finding the decedent was "contributorily negligent" in the accident, and that therefore presented "a reasonable doubt" not to convict petitioner. In addition, the decedent's blood test showed that the decedent had marijuana in her system at the time of the accident. App. 1189, l. 2 – 1191, l. 24.

As will be seen infra, defense counsel failed to subpoena the custodian of records for Verizon Wireless, and Judge Jefferson therefore excluded evidence regarding the decedent's phone records which defense counsel's paralegal said proved the decedent was talking on the phone at the time of the accident.

Further, Mayer later admitted he gingerly treated evidence the decedent had marijuana in her system at the time of the accident: "[A]t that time, which I believe is a failure, but my approach to that at the time that this was a fact that was so incendiary that when the jury heard it, they wouldn't need to hear it a lot more. Right? I mean, this was -- this was to me just a huge mitigating issue in who caused this wreck. And so, I didn't want to, you know, drag Ms. Zoll's [the decedent's] name through the mud. I didn't want to do anything to disrespect the family. . . . I felt like the ramifications would be commonsensical, but I think I miscalculated that. I think that I should've -- I think that I should've been more of the black hat advocate and said, you know, all the things that that meant about the victim's driving and everything else, and I didn't communicate that. . . . I would do it differently today." App. 1189, ll. 2-23.

As to the victim's dog being in the car, Mayer said: "We knew initially that there was a dog in the car with Ms. Zoll and we had questions about the character of the dog, if the dog was calm and just kind of sit [sat] in the seat next to her or if the dog was more of the more hyper dogs and was bouncing around and would've been a distraction. I talked to a witness at one point who, I believe, was on the phone with Ms. Zoll at the time of the collision. I was never able to find that person again. I tried to do it with the phone records instead."

Mayer also said he had hoped to show that the victim "was a routine user of marijuana, but also that she was actively high at the moment of the collision." App. 1186, l. 2 – 1187, l. 9. Mayer was not able to accomplish any of these defense goals. His failure to subpoena the custodian of records for Verizon did not allow the jury to hear the proffered evidence that the records showed the decedent was talking on her cell phone at the time of the accident.

Further, the trial records showed the defense also unable to prove the decedent's dog was a distraction to the decedent as she drove that fatal evening. The evidence only showed that the decedent's dog was also killed in the car accident.

Petitioner would later state that Dr. Bennett's testimony was a "train wreck." Dr. Bennett gave his scientific opinion that petitioner *was five to ten percent impaired* as a result of drinking at the time of the accident. Petitioner's defense was that she was not impaired that night, and several lay witnesses vouched for that fact. On cross-examination the solicitor had Dr. Bennett admit he had misrepresented himself in other cases, and that a "cease and desist order" had been issued against him holding himself out as a licensed pharmacist. App. 1170, l. 4 – 1171, l. 7. Petitioner, stating the obvious, testified she absolutely would not have had Bennett as a witness had she or Mayer known any of these compromising facts about Bennett in advance of trial. App. 1171, ll. 8-10.

The accident

The car accident in this case occurred on November 10, 2011. One car was driven by petitioner Robinson and the other car was driven by decedent Candy Zoll. Zoll's blood tested positive for marijuana. App. 912, l. 24 – 913, l. 1. Petitioner's blood was drawn at the hospital following surgery to remove her spleen as a result of the accident. Fifteen minutes prior to the blood draw, petitioner began receiving a blood transfusion. App. 331, l. 1 – 332, l. 13; App. 448, l. 6 – 449, l. 24. SLED toxicologist Tracy McKinnon testified petitioner's blood-alcohol reading was 0.09. App. 377, ll. 12-13.

Petitioner suffered from Stevens Johnson syndrome. [2] App. 824, ll. 8-25. The SLED toxicologist also testified that the prescribed medications for petitioner were within therapeutic dosing ranges. Petitioner took Zoloft as an antidepressant. App. 380, l. 8 – 382, l. 22; App. 419, l. 2 – 423, l. 9.

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2 Stevens Johnson syndrome is a rare, serious disorder of the skin and mucous membranes. The symptoms of the disorder are fever and flu-like symptoms. It is a very painful condition. See Stevens-Johnson syndrome. https://www.mayoclinic.org/diseases-conditions/stevens-johnson-syndrome/symptoms-causes/syc-20355936#:~:text=Stevens%2DJohnson%20syndrome%20(SJS),to%20heal%20after%20several%20days. ; https://en.wikipedia.org/wiki/Stevens%E2%80%93Johnson_syndrome.

The state's theory of the case was that petitioner crossed the center line and ran into the decedent's vehicle in the decedent's lane. App. 517, ll. 4-10. State's witness David Lee was qualified as an expert in the field of collision reconstruction and he testified the accident was a head on collision. App. 565 – 578.

Another witness, David Hill, testified for the defense as an accident reconstruction expert. App. 565, ll. 17-23. Hill and Lee agreed the accident happened in the decedent's lane, but Hill challenged Lee's findings as to the speed, and Hill also testified the accident was not a head on collision. Hill testified petitioner's BMW was travelling at a speed of 47 miles an hour, plus or minus three miles an hour. App. 752, l. 3 – 757, l. 8. Hill said petitioner's speed had "absolutely nothing to do with her crossing the yellow line. The 79 miles an hour [the state claimed was petitioner's speed] is 100 percent wrong just like the animation is 100 percent wrong. And we know that because we did the math." App. 757, ll. 17-23.

Petitioner testified in her own defense. Petitioner remembered coming around the curve on a road she travelled on often, and she saw headlights in her lane. Petitioner did not remember what happened after seeing the headlights in her lane. Her next memory was talking to EMS inside the ambulance. App. 857, l. 5 – 859, l. 5.

The defense theory of the case, as argued by defense counsel Mayer in closing, was that the decedent's car crossed the center line first. That was why petitioner saw headlights in her lane before impact. Petitioner then crossed the center line to avoid the decedent, but the decedent corrected, causing the collision to happen in the decedent's lane of travel. Defense counsel also testified that the state had a theory of "imaginary impairment." App. 1040, l. 18 – 1044, l. 11.

Directed verdict motion

In denying petitioner's motion for a directed verdict, the judge noted the state's evidence that petitioner was speeding. As to impairment, the judge stated petitioner was taking medications, and "[h]er own admission through that of her friend, Ms. Brittany, that they had been at Applebee's and that over a two hour period she had ingested two alcoholic drinks combined with the testimony of the toxicologist, there is direct as well as circumstantial evidence that would rise to the level of the state being able to prove beyond a reasonable doubt that she was sufficiently under the influence to impair her ability to drive with reasonable care and due care . . ." App. 682, l. 14 – 683, l. 22.

After the directed verdict was denied, defense counsel told the judge that he would present four or five "sobriety witnesses" in petitioner's defense. App. 687, l. 12 – 688, l. 18. Janet Jurosko was the first "sobriety witness." App. 689, l. 6 – 690, l. 5.

Sobriety witnesses

Janet testified she had been the auditor for Berkeley County for twenty-five years. Janet remembered seeing petitioner on the night of November 10, 2011, at Geronimo's, a restaurant and bar. She talked to petitioner that night. Janet said petitioner was not impaired. App. 689, l. 6 – 690, l. 5.

Janet later learned the accident occurred 20 to 30 minutes after she saw petitioner. She repeated that petitioner was sober, she was not impaired, and Janet did not even see petitioner with a drink that evening. App. 690, l. 2 – 692, l. 3. Janet told the jurors that petitioner was like a daughter to her, she went to church with her, and she would have given petitioner a ride if she had seen any sign of impairment that evening. App. 691, l. 23 – 692, l. 3.

Michele Metts also saw petitioner on the night of the accident. Michele testified that petitioner was sober and she did not appear impaired in any way. App. 695, l. 6 – 697, l. 17.

Jeffrey Forinash was retired from the Air Force. He saw petitioner at the Geronimo's restaurant and sports bar on the night of November 10, 2011. Jeffrey talked to petitioner for fifteen to twenty minutes. Jeffrey said petitioner was sober, she did not appear impaired in any way. App. 700, l. 6 – 703, l. 15.

Robert Mittelstadt was a bartender at Geronimo's on the night of November 10, 2011. He remembered seeing petitioner sit "directly across from me next to Mr. Jeff at the bar." He served petitioner two vodka and cranberry drinks. "She never drank the second one because I asked her if she wanted it and I actually discarded that in the sink before she left." Robert said petitioner took thirty to forty-five minutes to drink that one drink. "She seemed normal. She was completely lucid. I didn't see anything as far as slurred speech. Her gait seemed totally normal. So it just seemed like a regular day." Robert said as an experienced bartender, he had seen many intoxicated people and that petitioner was not intoxicated that evening. App. 706, l. 6 – 708, l. 23.

Petitioner's mother, Tammy Atkins, also testified about the night of the accident. There was evidence that petitioner stopped for an 18-pack of Bud Light beer on her way home. The accident occurred very soon after petitioner stopped for beer. Tammy went to look in the impounded car a few days later after the police had been through it. Tammy counted all of the unopened beer cans inside, and there were still eighteen unopened cans of Bud Light inside the car.[3] App. 783, l. 6 – 786, l. 3.

The paralegal investigator

Christopher Robertson was working in counsel Mayer's law office as a paralegal. He said he also did "some investigations." App. 789, ll. 2-21. Robertson testified he learned through investigation that decedent Zoll was on the telephone at the time of the traffic accident.

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3 Tammy Atkins said one can had a "puncture hole in it somewhere" but it was not opened at the top of the can. App. 785, l. 12 – 787, l. 17.

Assistant solicitor West immediately objected on the grounds of relevance. The objection was sustained on the grounds of relevance, speculation, and the lack of foundation. App. 789, l. 18 – 790, l. 5.

Robertson then said in his investigation, he was looking for factors to show decedent Zoll was distracted while she was driving that night. This assertion brought another objection from the state, which was again sustained, and the jury was excused. App. 790, ll. 6-21.

The judge then told defense counsel Mayer that if he wanted to introduce the decedent's phone records, he needed to have the custodian of records from the phone company, Verizon, to testify so he could have the records authenticated as a business record. The judge told Mayer he could not use Robertson as the witness to admit the decedent's phone records. App. 790, l. 17 – 803, l. 24.

Robertson's testimony was then proffered. Robertson said the phone records showed the decedent had an incoming call at 8:39 which ran until 8:43 p.m., which was the time of the accident. App. 804, l. 3 – 806, l. 18. Robertson said he concluded that Candy Zoll was on the telephone with Patricia Malphrus at the time the accident occurred. App. 806, l. 11 – 807, l. 9. The judge again sustained the state's objection to testimony that the decedent was on the telephone with Malphrus at the time of the accident. The judge reasoned Robertson was not the custodian of the phone records. App. 811, l. 1 – 813, l. 19.

Petitioner testifies in her own defense

Petitioner had worked for various oral surgeons and a plastic surgeon in North Carolina. She grew up in Monck's Corner, and she went to Berkeley High School. After that, she trained to become a dental assistant. App. 823, l. 6 – 825, l. 4.

As stated, petitioner suffered from Stevens Johnson syndrome. This condition adversely affected her ability to work. However, in November of 2011 she was able to work from home

for R.S. Medical company, "doing insurance verifications and pre-authorizations." App. 824, l. 13 – 825, l. 25.

Petitioner did not have any memory problems on November 10, 2011. Her memory problems resulted from the traumatic brain injury she suffered in the car accident that November 10, 2011 night. App. 825, l. 23 – 827, l. 6. Petitioner related that she had driven on the road where the accident occurred "thousands" of times previously. In fact, that road was even where she learned how to drive. App. 826, l. 15 – 827, l. 20. As to the curve in question on that road, petitioner testified "the speed limit on that curve forever was 45 miles an hour." App. 828, l. 3 – 830, l. 1.

Petitioner told the jury on the night of the accident she went to Applebee's just before five o'clock in the afternoon with her friend Brittany Hartley. Petitioner had a single cranberry vodka and they talked for an hour over that one drink. When the bartender asked if she wanted another drink, petitioner ordered second vodka cranberry.

Later that evening, at about 7:15 PM at Geronimo's, petitioner ordered the second cranberry vodka. At the time she was talking with Jeff Forinash, the retired Air Force man. App. 835, l. 1 – 837, l. 12.

Petitioner testified she was not impaired when she left Geronimo's. Petitioner stopped at the Scotchman to purchase the Bud Lite eighteen pack. App. 837, l. 13 – 840, l. 1. Petitioner said all of this occurred over a three and a half hour period, and she was not impaired in any manner. App 839, l. 18 – 840, l. 14.

As for the accident, petitioner said, "I remember leaving the Scotchman. The next thing I remember is entering the curve and seeing headlights in my lane." Petitioner had no memory beyond that of the accident. App. 840, ll. 15-23. Her next memory was being in the ambulance with the paramedics asking her questions. App. 840, l. 24 – 841, l. 19.

Dr. Robert Bennett

The defense then called Dr. Robert Bennett as a witness. Defense counsel Mayer asked that Bennett be qualified as an expert in forensic toxicology. App. 873, l. 6 – 875, l. 4. Assistant solicitor West then proceeded to voir dire Bennett. Bennett said he was "able to keep up" with the field of toxicology on the internet. App. 876, l. 24 – 877, l. 5.

When the solicitor asked Bennett if his work had been peer reviewed, Bennett responded, "What do you mean by that?" App. 877, l. 6 – 878, l. 3. After West explained, Bennett ultimately said, "Any type of work that I provide, that work is available for anyone to examine it, peer review it, ask me questions about it, criticize it. All the work that I do is available for that. And my work is not done in a vacuum." App. 878, ll. 4-11.

West did not object to Bennett being qualified as an expert in forensic toxicology, and he was then qualified as an expert in forensic toxicology. App. 879, ll. 12-18.

Bennett then testified he understood petitioner had one drink at approximately 5 o'clock, another drink at approximately 7 or 7:30 PM, and a third drink at approximately 8:30 PM. App. 881, l. 22 – 882, l. 17. Bennett said petitioner would have had "a minimal amount of alcohol remaining in her body by the time 8:45 arrived." App. 883, l. 25 – 884, l. 2.

Defense counsel Mayer then asked Bennett if "minimal" meant a zero blood alcohol reading. Bennett responded that he estimated petitioner had between zero and ".01, .015; a very minimal amount remaining at that time." App. 884, ll. 3-15. Bennett then opined that this would have made a person "impaired to a slight degree." Bennett elaborated that a scientific estimation would be that petitioner *had a five to ten percent impairment rate level* based on that amount of alcohol. App. 884, l. 6 – 885, l. 9. (emphasis added).

Mayer then asked Bennett if it was his opinion that with a level between .01 and .015 that petitioner would have been capable of safely driving a vehicle. Bennett answered, "The level of

impairment affects people differently so I wouldn't be able to answer conclusively based on her specific physiology." App. 886, ll. 8-13.

As for the decedent, Bennett confirmed Zoll tested positive for marijuana. App. 912, l. 24 – 913, l. 22. Bennett opined the marijuana can affect a person's judgement and ability to respond to "stimuli around them." App. 912, l. 24 – 913, l. 22.

The assistant solicitor asked Bennett on cross-examination how alcohol would affect an individual also taking "Trazadone, Clonazepam, and Benadryl." App. 917, ll. 19-21. Bennett said alcohol was a central nervous system depressant, and it reduced a person's ability to respond to stimuli around them as did the medications. "All of those depress a person's central nervous system and creates an end result of what we've been referring to today as impairment." App. 917, l. 19 – 918, l. 9.

The assistant solicitor then had Bennett admit his license as a registered pharmacist expired in 1999, yet Bennett submitted a document in a case in 2009 stating he was still a registered pharmacist. Bennett also admitted that a "cease and desist" order had been issued against him continuing to hold himself out as a licensed pharmacist. App. 920, l. 21 – 921, l. 22.

The judge then also allowed Bennett to be cross-examined about a Post and Courier newspaper article which stated Bennett's credentials, methods, and the reliability of his findings were suspect or controversial. Bennett said he was familiar with the article, and he was also aware of a case where a woman temporarily lost custody of her two children because Bennett "conducted a test saying that she was as drunk (sic) when later a physician concluded that Ferguson's [the woman in question] anemia had been throwing off the results." Bennett then said that was an "incorrect statement." He also asserted that the newspaper article was erroneous. App. 922, l. 7 – 923, l. 11.

PCR Hearing

Petitioner testified at the PCR hearing that Bennett's testimony that she was five to ten percent impaired on the night of the accident flew in the face of their defense that she was not impaired that evening. The cross-examination of Bennett, especially the "cease and desist order" being issued against Bennett to stop holding himself out as a registered pharmacist made his testimony a "train wreck." App. 920, l. 21 – 923, l. 11; App. 1169, l. 10 – 1171, l. 10.

As stated above, defense counsel said Bennett "was just completely destroyed on cross-examination. It was one of the worst moments of my professional career." "[I] didn't do much of a background investigation. That was my background investigation [family court lawyers] on Bennett." App. 1192, l. 4 – 1193, l. 24.

Mayer added that Grover Seaton had briefly been his co-counsel. However, Seaton, a more experienced lawyer, got off of petitioner's case because of an alleged conflict. Mayer remembered; "I have a vague memory of Grover Seaton saying something like, why are you using that guy [Dr. Bennett] or don't use that guy. But I don't think he had an alternative. . . . he didn't articulate any reason as to why I shouldn't use Dr. Bennett or why Dr. Bennett was a poor choice. But there was some word of caution from Grover Seaton about it. If he'd have said, the guy is known as a quack and he might be good in family court but not in circuit court, I probably would've heeded his advice. But as I recall, he couldn't give me any reason not to go forward with Bennett. He just said don't." App. 1193, l. 21 – 1194, l. 19.

Mayer characterized the unexpected testimony from Bennett that petitioner had a five to ten percent impairment rate at the time of the accident as "so confusing." However, Mayer admitted his whole defense was that petitioner was not impaired. Mayer acknowledged that Bennett's testimony in this regard "was horrible." App. 1202, l. 5 – 1205, l. 7.

Order of Dismissal

The PCR court found no deficiency on the part of defense counsel as it related to use of Bennett as an expert witness. "The Court observes that the present case is not an instance where defense counsel failed to investigate an expert witness at all, but that the scope of his investigation did not reveal the information relied upon by the State at trial. Counsel discussed the use of Bennett with others and evidently found him well regarded." App. 1221.

The PCR court concluded that "Dr. Bennett is well regarded by many members of the bench and bar." "The Court finds Applicant has not shown precisely how Counsel could have known of Bennett's alleged deficiencies as a witness, or that he should have been on notice to look for them. Counsel did note a vague word of caution from Seaton that he should not use Bennett, but in the absence of some explanation as to why he should not have done so, the warning was insubstantial." App. 1222.

The judge found petitioner suffered no prejudice from the alleged deficiency regarding the use of Bennett as a defense expert witness. The judge wrote that if the prosecution's cross-examination totally discredited Bennett, then the jury would have given little to no consideration of his testimony that was argued to be harmful or confusing. App. 1223. The order of dismissal reasoned that, "Dr. Bennett testified that the victim was under the influence of marijuana at the time of the accident. Absent Dr. Bennett's testimony to that effect, Applicant would not have had that argument before the jury at all. That the witness was something less than Saint Albert, and that the State was able to find means of effective cross-examination, does not diminish the important value of his testimony in the context of Counsel's intended strategy." App. 1223-1224.

"[T]he sum total of the allegation before the Court is that an imperfect expert witness provided imperfect testimony in a case that offered Applicant imperfect facts for a defense. No witness is perfect, and where a defendant's expert witness has testified numerous times over a

career it is unlikely the prosecution will be unable to obtain some valid means of challenging their credibility. Here, Dr. Bennett provided testimony consistent with the defense strategy, freckled by a zealous prosecutorial effort to discredit him. Counsel is not rendered ineffective thereby." App. 1224.

Discussion

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), the defendant was tried for homicide by child abuse in the death of the fetus. The Supreme Court found defense counsel was ineffective in calling an expert witness whose testimony undermined the defense, and for failing to call an expert witness whose testimony supported the defense.

Trial counsel admitted in this case that Dr. Bennett's testimony on petitioner being impaired undermined their entire defense that petitioner was not impaired on the night of the accident. The PCR court's order was in error in ruling otherwise. The court's reasoning that if Bennett was totally discredited as a witness, which he was, that the jury would have simply given little or no consideration to his testimony was also incorrect. App. 123. Bennett hurt petitioner at trial where he was supposed to be a key defense witness in her favor.

In McKnight, the first trial ended in a mistrial. During the first trial the state tendered Dr. Proctor, the pathologist who performed the autopsy, to testify that cocaine was a contributing factor in causing the fetus to die along with chorioammionitis and the funisitis. Dr. Proctor admitted that it was possible that chorioammionitis and the funisitis alone could have caused the death of the fetus. Dr. Brett Woodard opined for the state, that having ruled out other causes of death, that cocaine use alone caused the chorioammionitis and the funisitis which resulted in the fetal death.

The defense called Dr. Steven Karch, a cardiac pathologist and expert in drug-related deaths, to opine that he could not determine the underlying cause of the chorioamnionitis and

funisitis in the fetus, *but these conditions alone were responsible for the death of the still born fetus*. Dr. Karch said the evidence led to the conclusion that the mother was a cocaine user. However, Dr. Karch added it was also impossible to rule out syphilis as a cause of death. Dr. Karch also rebutted the state's experts' testimony on the harmful effects of cocaine and the notion of "crack babies" by explaining that cocaine, while dangerous, was not as dangerous as the medical community once believed. There were flaws in medical studies linking cocaine to stillbirth.

Dr. Sandra Conradi testified as a defense witness that she would have ruled the cause of death 'undetermined, rather than "[a] homicide. However, upon further questioning, the doctor *eliminated all potential natural causes of death*, testifying that it was "unlikely, but possible" that the chorioamnionitis and funisitis led to stillbirth and that her tests for syphilis were negative. On the other hand, Dr. Conradi testified that she could not rule out cocaine as a cause of death." McKnight v. State, 378 S.C. 33, 42, 661 S.E.2d 354, 358 (2008).

At the second trial, Dr. Edward Proctor testified that cocaine was a contributing factor in causing the fetus to die along with chorioammionitis and the funisitis. Dr. Brett Woodard again testified that by ruling out other possible causes of death, it was his opinion that McKnight's cocaine use alone caused the chorioamnionitis and funisitis in the fetus which resulted in fetal death. McKnight v. State, 378 S.C. 33, 40-42, 661 S.E.2d 354, 357-58 (2008).

At the second trial, the defense did not call Dr. Karch back to testify and only called Dr. Conradi. Dr. Karch, who as seen supra was very helpful to the defense during the first trial, was on an extended trip abroad. Defense counsel said she never thought to request a continuance or elicit Dr. Karch's testimony via videotape, and that because of "her caseload" she could not find another expert who could, as Dr. Karch did, effectively rule out cocaine as the cause of death.

The Supreme Court held "we find that it was unreasonable for counsel to produce a single expert witness at the second trial whose testimony had clearly benefitted the State's case in the first trial, and that her reasons for doing so do not qualify it as a valid strategic matter . . . Counsel was also certainly aware that Dr. Conradi's process of ruling out all other potential natural causes of death to arrive at an opinion on the actual cause of death mimicked that of the State's expert Dr. Woodard." This Court wrote, "The methodology used by the *only* expert witness for the defense in determining the cause of fetal death mimicked that of the State's star expert and, in this way, Dr. Conradi's testimony primarily served to bolster the State's theory of the case excluding all other potential causes of death in order to conclude that cocaine caused the stillbirth." McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008).

Here, Dr. Bennett clearly undermined the defense that petitioner was not impaired on the night of the accident. Bennett testified that petitioner had an impairment rate of five to ten percent. Dr. Bennett also opined that the alcohol in petitioner's system, coupled with the medications she was taking, would have slowed her reaction to stimuli around her and effectively lessened her alertness as a driver. It is certainly not a stretch to say that a normal juror would have understood Dr. Bennett to be testifying that petitioner was impaired for the purposes of that element of the felony DUI statute.

The PCR court here labelled Dr. Bennett simply an "imperfect witness." It reasoned that no witness was perfect, and further rationalized that any expert witness who had testified "over his career" could seemingly be exposed in a similar manner as the solicitor did to Dr. Bennett during petitioner's trial. App. 1224. This conclusion is respectfully with support in the record of this case, and the post-conviction case law of this state.

In Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), the Supreme Court found defense counsel was ineffective for calling the live-in girlfriend of the defendant as a defense witness

without interviewing her first in that first degree criminal sexual conduct with a minor and lewd act case. The alleged victim was the nine-year-old daughter of petitioner's girlfriend. The defense theory of the case was that the defendant and his girlfriend had sexual intercourse one morning, and that the defendant's semen was transferred to the alleged victim's shorts when she sat on their bed shortly thereafter. The Supreme Court found this defense was plausible.

However, when the girlfriend was called as a witness, the defense asked her whether she and petitioner had sex the morning her daughter was allegedly molested. The girlfriend responded, "No sir, that's wrong," thereby undermining the theory of the defense. Ingle v. State, 348 S.C. at 470-71, 560 S.E.2d at 402-03.

The defense attorney in Ingle explained that he did not interview the girlfriend because he relied on the defendant's assurance that the girlfriend would be honest and admit having intercourse with him on the morning of the alleged assault. This Court found defense counsel was ineffective in calling the girlfriend as a defense witness without interviewing her first, where her testimony undermined the defense.

In the present case, defense counsel admitted that Dr. Bennett's testimony undermined the defense that petitioner was not impaired, and that his testimony was "horrible." Defense counsel certainly did not disagree with petitioner's description of Dr. Bennett's testimony as being a "train wreck" of a witness.

Although defense counsel accepted blame for Dr. Bennett's "horrible" testimony, he did rationalize his failure to investigate Dr. Bennett's background by stating that his temporary co-counsel, Seaton, only advised counsel not to use Dr. Bennett as a witness without much explanation. At a minimum, co-counsel's warning not to use Dr. Bennett was sufficient to alert counsel that further investigation of Bennett was in order. Defense counsel acknowledged that Seaton was a much more experienced lawyer, who seemingly was brought on as co-counsel

because of that experience. However, counsel did not heed Seaton's advice and indeed his warning not to call Dr. Bennett because Seaton apparently was not *specific enough* in his admonition *not to use Bennett* as an expert witness.

While the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). Seaton's warning to defense counsel was sufficient to alert him that further investigation into Dr. Bennett was required, and that further investigation in this case would have averted petitioner's own expert witness from undermining -- if not outright destroying -- her defense that she was not impaired. As seen, petitioner had several lay witnesses testify she was not impaired that evening. That was her defense. However, trial counsel's lack of preparation of Dr. Bennett, and his failure to investigate led to the cross-examination showing the jury that Dr. Bennett was not in good standing in the medical community. Dr. Bennett opined petitioner was impaired on the night of the accident. "Train wreck" was quality introspection on the part of defense counsel when he described Dr. Bennett at PCR.

While the PCR court wrote petitioner benefitted from Dr. Bennett's testimony because Dr. Bennett stated the decedent had marijuana in her bloodstream, any toxicologist, without the baggage of Dr. Bennett, could have also rendered this opinion from the *available evidence.* See, also, Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (2015) (defense counsel was deficient, and the defendant prejudiced by trial counsel failing to call a medical expert to challenge the state's medical evidence).

In sum, Dr. Bennett was exposed on cross-examination as "outlaw" witness who did not have a favored status with the pharmacy board which had issued a "cease and desist" order against him. Defense counsel here had a duty of reasonable investigation and his failure to

conduct that investigation severely damaged petitioner's defense. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Dr. Bennett's testimony so undermined petitioner's defense that she was not impaired in this felony DUI case that the PCR court's conclusion that no expert was "perfect," and not without baggage respectfully does an injustice in this case. App. 1224.

The PCR court erred in finding that defense counsel was not deficient in his failure to investigate, and in his calling Dr. Bennett as the defense toxicologist in this case. Petitioner also suffered prejudice from defense counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, the post-conviction court should be reversed, and petitioner's case should be remanded to the Berkeley County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

This 25th day of March, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

SHANA ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-002216

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the brief of petitioner in the above-referenced case has been served upon Samantha Jo Weidauer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 25th day of March, 2022.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER