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SC Court of Appeals

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

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Defense counsel was warned by another attorney not to use Dr. Bennett as an expert in a felony driving under the influence resulting in death case. Dr. Bennett's license had expired, and he was in trouble with the pharmacy board. This was all discoverable, and Dr. Bennett then gutted petitioner's defense by testifying she was impaired at the time of the accident. Defense counsel rendered ineffective assistance of counsel in this case.

The state alleges that defense counsel was "justifiably surprised" by Dr. Bennett's testimony as to his legal troubles but it claims that Dr. Bennett's testimony was consistent with petitioner's "theory of defense." Brief of Respondent at 15. Petitioner's "theory of defense" in this felony DUI case was that she was not impaired at the time of the accident. Defense counsel had also been warned by another attorney not to use Dr. Bennett, he ignored that advice, and counsel admitted his investigation was inadequate.

The state also contends: "Petitioner's own version of events conceded a significant amount of drinking prior to the collision..." Brief of Respondent at 7. As seen in petitioner's initial brief, she had several lay witnesses swear under oath that she was not impaired after a couple of drinks over more than a three hour period on the night of the accident. Further, it is uniformly understood that the effect of alcohol on an individual varies based on many factors, including the drinking experience or tolerance of the individual drinking the alcohol, whether the person adequately ate and slept beforehand, and other factors. Petitioner was also well aware of the road she was driving on, she knew the speed limit was forty-five miles per hour, and she was well aware of the curb in the road where the accident occurred.

Defense counsel Aaron Mayer was very assertive with petitioner that the state could not carry its burden of proof against her, and that she would “never see any jail time.”¹ App. 1165, l. 15 – 1166, l. 6; App. 1190, l. 20 – 1191, l. 21.

Respectfully, any acceptable investigation would have revealed that Bennett’s license as a registered pharmacist had expired in 1999. However, Bennett submitted a document in a case ten years later falsely stating he was still a registered pharmacist. Bennett was forced on cross-examination to admit a “cease and desist” order had even been issued against him to stop holding himself out as a licensed pharmacist. App. 920, l. 21 – 921, l. 22.

Further, the local newspaper, the Post and Courier, had published an article which stated Bennett’s credentials, methods, and the reliability of his findings were suspect. Bennett was well aware of this article although he claimed it was erroneous.

Defense counsel admitted: “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. (Emphasis added). See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

As defense witness, Bennett testified that petitioner was “five to ten percent impaired” on the night of the accident. A defense witness telling the jury the defendant was impaired in a felony DUI case is horribly damaging, if not almost unbelievable.

The cause of the accident was certainly open to debate where the decedent’s blood-alcohol content tested positive for marijuana, she was talking on the phone at the time of the accident, and her dog was also in the car and where petitioner’s prescribed medications were

¹ Defense counsel admitted he led petitioner “astray,” but counsel noted the decedent had been talking on her phone at the time of the accident, she had marijuana in her system, and her dog being in the car was an additional distraction to her driving. App. 1189-1191. In short, counsel thought petitioner had a good defense before his own expert witness ruined it.

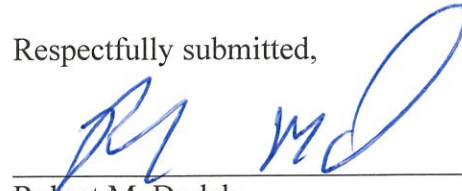
conversely within therapeutic dose ranges. Again, numerous witnesses testified that petitioner was not impaired after having a few drinks. Bennett's testimony that petitioner was impaired made it likely the jury to believe Bennett, a "professional" witness, over lay witnesses that knew petitioner personally.

The state's contention that defense counsel provided effective representation where counsel admitted the solicitor "completely destroyed" his expert witness on cross-examination after counsel had been warned not to use this expert witness, counsel admitted his investigation of this proposed witness was inadequate and where that expert gutted petitioner's defense, respectfully stretches any assumption or presumption of competent counsel beyond the breaking point. See Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007); Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the arguments in the brief of petitioner and in this reply brief, petitioner's conviction should be reversed, and this case remanded to the Berkley County Court of General Sessions for a new trial.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 16th day of September, 2022.

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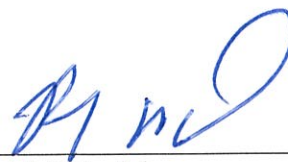
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RESPONDENT.

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 reply brief of petitioner in the above referenced case has been served upon Lauren T. Mims, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) this 16th day of September, 2022.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER