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Apr 25 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2024-UP-117

SHANA ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002216

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner requests that this Court grant rehearing because it may have overlooked the fact that while a warning from trial counsel's trusted former co-counsel against using Dr. Robert Bennett as an expert witness standing alone may not have constituted deficient performance, the failure to reasonably investigate Bennett after having received that forewarning did constitute deficient performance.

Further, it respectfully is not logical to conclude, as this Court did, that trial counsel could not have discovered the same published damaging information about Bennett that the solicitor located prior to trial, and that he used to destroy Bennett on cross-examination. This readily

available material included a newspaper article in the *Post and Courier* that described Bennett's controversial credentials, methods, and the suspect reliability of his findings. Moreover, Bennett admitted at trial that he was aware of this newspaper article and a minimum of inquiry would have led trial counsel to discover negative facts about Bennett, including that his license as a pharmacist had been suspended.

Defense counsel admitted "[I] didn't do much of a background information. That was my background information [family court lawyers] on Bennett." App. 1192, l. 4 – App. 1193, l. 24. Defense counsel starkly acknowledged: "It was one of the worst moments of my professional career."

A reasonable investigation into Bennett's background would have saved the disaster that followed with Bennett during petitioner's trial. See Ard v. Catoe 372 S.C. 318, 642 S.E.2d 590 (2007). Lounds v. State 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008); McKnight v. State 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008). If trial counsel had done a reasonable investigation of Bennett he would not have retained him, and this Court would never have had to rationalize that "trial counsel could not predict Bennett would deviate from what was discussed prior to trial." See Shana Robinson v. State 2024-UP-117 (filed April 10, 2024) at p. 3, *citing* State v. Sweet 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000) ("a criminal defendant is entitled to a fair trial, not a perfect one.").

Further on this point, this Court may have misapprehended the fact that Sweet respectfully has no application to this post-conviction relief appeal. In Sweet, this Court on direct appeal, while noting that a criminal defendant was entitled to a fair trial, not a perfect one, nonetheless concluded that the assistant solicitor's comments, which this Court concluded were impermissible references to the defendant's failure to testify, deprived Sweet of a fair trial. The

ineffectiveness issue in this case was whether trial counsel conducted a reasonably adequate inquiry or investigation into Bennett before calling him as an expert witness. Perfection is far from being at issue here.

There can be no doubt that Bennett's testimony was a disaster for petitioner. Defense counsel admitted that fact at PCR. Bennett testified that petitioner was "five to ten percent impaired" at the time of the accident. App. 884, l. 6 – 885, l. 9. That impairment testimony was horribly damaging -- if not incredible -- coming from a defense expert in a felony DUI case. It also occurred against the backdrop of numerous lay witness testifying that they interacted with petitioner that night, and she was not impaired after having a few drinks over a several hour period of time. Trial counsel admitted Bennett's testimony in this regard "was horrible" App. 1202, l. 5 – 1205, l. 7.

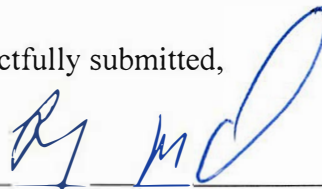
This Court should respectfully reconsider its holding -- and agreement with the PCR judge -- that Petitioner Shana Robinson did not carry her burden of showing trial counsel's representation fell below an objective standard of reasonableness. Shana Robinson v. State 2024-UP-117 (filed April 10, 2024) at p. 2. See McKnight v. State, 378 S.C. 33, 45-46, 661 S.E.2d 354, 360 (2008)(Counsel was ineffective for calling an expert witness whose testimony undermined the defense and when she failed to call an expert whose testimony supported the defense); Wiggins v. Smith, 539 U.S. 510, 514 (2003) ("In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' Strickland, 466 U.S., at 688 (1984) which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time,' *id.*, at 689); Richardson v. Belleque, 362 Or. 236, 262, 406 P.3d 1074, 1088

(2017)(ineffective representation where an “adequate knowledge of the underlying facts” did not exist to support an assertion of a strategic trial decision about using an expert).

Trial counsel should be credited for his candid PCR testimony admitting his deficiency in retaining Bennett, and for calling him as a defense expert. Counsel testified at PCR that Bennett’s testimony was a “train wreck.” Bennett admitted at trial that 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. The failure of a minimally adequate investigation into Bennett prejudiced petitioner, particularly where the jury convicted petitioner after numerous lay witnesses testified she was not impaired on the night of the accident.

Rehearing should respectfully be granted.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR PETITIONER

This 25th day of April, 2024.

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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 Petition for Rehearing in the above-referenced case has been served upon Danielle E Dixon, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Shana Robinson, #360268, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 25th day of April, 2024.


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

From: [Pollard, Shelby](#)
To: [Danielle Dixon](#); [Vickie Hall](#)
Cc: [Dudek, Robert](#)
Subject: 2018-002216 Shana Robinson v. The State - Petition for Rehearing
Date: Thursday, April 25, 2024 11:00:00 AM
Attachments: [Cover Letter to AG 4.25.24 Petition for Rehearing.pdf](#)
[2018-002216 Shana Robinson v. The State - Petition for Rehearing.pdf](#)

Good Morning,

Please find attached for service in the above-referenced case the Petition for Rehearing. This will be filed today, April 25, 2024, with the Court of Appeals via email filing.

Thank you,
Shelby

Shelby Pollard

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