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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2024-UP-117 (S.C. Ct. App. Filed April 10, 2024)

Lower Court Case No. 2014-GS-08-00313

SHANA ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002216

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 29, 2024.

QUESTION PRESENTED

Whether the Court of Appeals err by affirming the PCR's order finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert witness in forensic toxicology in a felony DUI case, where Bennett testified petitioner would have had a five to ten percent "impairment rate" at the time of the accident, which was directly counter to the testimony of defense witnesses 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 defense counsel's failure to adequately investigate Bennett's background constituted deficient performance which prejudiced petitioner?

STATEMENT OF THE CASE

Procedural history

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 a 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 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 DUI 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, through undersigned counsel, filed a petition for a writ of certiorari with this Court on July 31, 2019. The state filed a return to this petition. This Court ordered petitioner's case transferred to this Court in its order dated January 7, 2020. The Court of Appeals granted

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

the petition for writ of certiorari in its order dated November 23, 2021. The Court of Appeals affirmed petitioner's conviction in Shana Robinson v. State, 2024-UP-117 (filed April 10, 2024). App. 1-4. Petitioner sought rehearing from the Court of Appeals. App. 5-9. Rehearing was denied. App. 10.

This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals err by affirming the PCR's order finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert in forensic toxicology in a felony DUI case, 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 the testimony of defense witnesses 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 defense counsel's failure to adequately investigate Bennett's background constituted deficient performance which prejudiced petitioner.

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 that she hit the decedent's car while driving impaired.

Petitioner's defense was that she was not impaired. She had several lay witnesses, as will be seen infra, testify 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 forty-five, 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. He also represented petitioner in her felony DUI causing death criminal trial. 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 those "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. That presented "a reasonable doubt" not to convict petitioner. However, 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.

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. However, 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[2] [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 decedent'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," which again, were excluded for Counsel Mayer's failure to subpoena the custodian of records.

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[2] "Decedent" is used in this certiorari petition for ease of reference rather than "Ms. Zoll."

Mayer also said he had hoped to show that the decedent "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 deficiency in not subpoenaing the custodian of records for Verizon prevented the jury from hearing the "phone distraction" evidence. Further, the trial records showed the defense was 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, which was obviously unfortunate also. Finally, as seen above, trial counsel admitted he made an error in judgment by not capitalizing on the fact the toxicology results showed that decedent had marijuana in her blood stream – possible impairment -- at the time of the accident.

As will be seen in more detail infra, Defense counsel Mayer would later admit that 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 described Bennett's testimony as being "horrible" for the defense. App. 1202, l. 5 – 1205, l. 7.

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 testified and vouched for that fact as seen infra. 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 the decedent. Dr. Bennett testified that the decedent's blood tested positive for marijuana. He said this could affect a person's ability to "respond to stimuli around them," their judgment and ability to "multi task." App. 912, l. 24 – 913, l. 23.

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. 4 – 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. "Basically the ethanol level in this case at an .09 level the State per se law of a 0.08 percent so you're looking at something that's just over the State per se law for driving under the influence of ethanol . . . Ethanol is drinking alcohol." App. 378, ll. 10-19.

Petitioner suffered from Stevens Johnson syndrome. [3] 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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[3] 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 while 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 said 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 offered that 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. The judge also reasoned that petitioner was taking medications, and evidence she "had ingested two alcoholic drinks" in a two hour period of time. App. 682, l. 14 – 683, l. 22.

Sobriety witnesses

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.

Janet Jurosko 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 testified 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, and 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.

The paralegal investigator

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

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 the decedent 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. 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 a second vodka cranberry. A little 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. 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 837, l. 13 -840, l. 14.

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 she tested positive for marijuana. App. 912, l. 24 – 913, l. 22. Bennett opined that 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 acknowledged 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.

Bennett was also 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 contended that was an "incorrect statement," and 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 was directly in conflict with her 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 (Trial); App. 1169, l. 10 – 1171, l. 10 (PCR).

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 also 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, "[D]r. 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.

The Court of Appeals opinion

The Court of Appeals in affirming the PCR court's denial of PCR relief reasoned 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:

> While trial counsel received a warning from his former co-counsel about using Bennett as an expert witness, trial counsel asked for co-counsel's reasoning and co-counsel was unable to articulate any reason. Even with a vague warning, it is unclear how trial counsel could have uncovered the cease and desist order or the news article

> that was published eight years before the trial. Further, with regard to Robinson's argument that Bennett's impairment testimony reflected trial counsel's deficient performance, Robinson fails to offer how additional or different preparation or investigation would have resulted in different testimony. *Strickland*, 466 U.S. at 687–88 (holding that to demonstrate deficiency, "the [applicant] must show that counsel's representation fell below an objective standard of reasonableness"). Trial counsel testified he met with Bennett before the trial and the testimony he expected him to give was consistent with the strategy of the case. According to trial counsel, at no point during preparation did Bennett indicate he intended to use the percentage impairment scale that Petitioner contends was detrimental to her defense that she was not impaired at all. Trial counsel could not predict Bennett would deviate from what was discussed prior to trial. *See 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.").

App. 3.

As to prejudice, the Court of Appeals reasoned that "it was unlikely credible expert testimony would have changed the out come of the trial. The Court wrote there was evidence petitioner was speeding, her BAC was .09, and she admitted to consuming three drinks that night. App. 4.

On rehearing, petitioner noted that:

> [T]his 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.").

App. 5-6.

Petitioner also noted that State v. Sweet was inapplicable since defense counsel was undoubtedly deficient for calling Bennett as an expert witness and "perfection" versus "fairness" was at the issue in this case. App. 6.

Discussion

In McKnight v. State, 378 S.C. 33, 39, 661 S.E.2d 354, 356 (2008), the defendant was tried for homicide by child abuse in the death of her "nearly full-term stillborn baby girl in May 1999." The autopsy revealed the "presence of benzoylecgonine (BZE), a by-product of cocaine." 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.

In McKnight, at the second trial, after a mistrial, the defense called Dr. Sandra Conradi again as a defense expert who again testified that

> "[A]lthough she could not precisely determine the cause of death, neither chorioamnionitis, funisitis, nor syphilis caused the fetus to die. Counsel did not examine Dr. Conradi on the published study favorable to McKnight's defense that the doctor had mentioned at the first trial. Furthermore, counsel did not call any other expert to rebut or discredit the medical studies cited by the State's experts as Dr. Karch had done previously [during the first trial], nor did counsel cross-examine the State's experts on the matter. As in the closing arguments of the first trial, the State began by pointing out Dr. Conradi's failure to eliminate cocaine as a cause of fetal demise and declared that in conjunction with the testimony of Dr. Woodard, Dr.

> Conradi "really helped us out in figuring out the cause of death in this particular case" by eliminating all other relevant causes of death.

McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 358-59 (2008).

Our Supreme Court found defense counsel was ineffective. While Dr. Condradi concluded the cause of death was indeterminable while the state's expert, Dr. Woodard, concluded that cocaine caused the death, "counsel was certainly cognizant of the fact that the State's closing argument at the first trial used these experts' similar methods of analysis to its advantage. From this, counsel should have reasonably concluded that regardless of Dr. Conradi's ultimate conclusion, her testimony went to the heart of the State's case, and that substitute and/or additional testimony was needed." McKnight v. State, 378 S.C. 33, 44, 661 S.E.2d 354, 359 (2008), *citing* Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

In Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), defense counsel called 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. While Ingle did not involve expert testimony, the ineffectiveness of defense counsel was conceptually no different.

Trial counsel here admitted that Dr. Bennett's testimony on petitioner being impaired undermined their entire defense that petitioner was not impaired on the night of the accident. There was no attempt to justify the bungled defense as "trial strategy" as the attorney in McKnight attempted. The PCR court speculated -- incorrectly petitioner submits -- that if Bennett was totally discredited as a witness, which he was, "[t]hen the jury would have simply given little or no consideration to his testimony argued to be confusing or harmful." App. 1223. Bennett hurt petitioner badly at trial where he was supposed to be a key defense witness in her favor. The *per curiam* summary opinion of the Court of Appeals affirmed the PCR court -- essentially finding any error in not properly investigating or vetting Bennett was harmless. App. 4. However, the fact petitioner was allegedly speeding was irrelevant to the issue of whether she was impaired, and the BAC of .09 was barely over the legal limit of .08, and numerous defense witnesses testified petitioner was not impaired on the night of the accident. The panel's reasoning that petitioner admitted "consuming three drinks the evening of the collision," even if accurate, was, respectfully, not compelling evidence of impairment. App. 4. It is not too much to say that some jurors would likely recall that the inference of impairment was once .10, and .15 before that, and it is only an inference regardless. See State v. Weaver, 265 S.C. 130, 139 217 S.E.2d 31, 35-36 (1975); Joel Gottlieb, The South Carolina Implied Consent Law: The "Breathalyzer and the Bar, 22 S.C.L. Rev. Issue 2, at 9, n. 47 (1970); App.1108, ll. 4-10.

Again, 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 was certainly no exaggeration or stretch to reason 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.

To his credit, 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 him not to use Dr. Bennett as an expert 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 factors, "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. See Wiggins v. Smith, 539 US. 510, 527 (2003)("In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.").

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.

Again, referring back to the PCR court's order the Court of Appeals was considering after granting certiorari and having full briefing, it must be remembered that the PCR court wrote petitioner benefitted from Dr. Bennett's testimony because Dr. Bennett stated the decedent had marijuana in her bloodstream. However, *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 an "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,

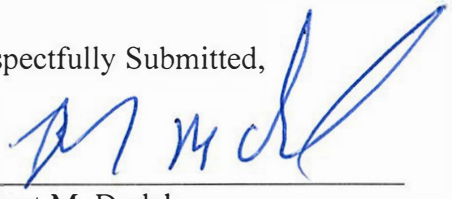
642 S.E.2d 590 (2007). Dr. Bennett's testimony so undermined petitioner's defense that she was not impaired in this felony DUI case that the PCR court's conclusion in denying relief -- that no expert was "perfect," and not without baggage -- most respectfully does not do justice in this PCR case. App. 1224.

The Court of Appeals erred in finding that defense counsel was not deficient in his failure to investigate, and in his calling Dr. Bennett as the defense expert in this case. Petitioner also suffered prejudice from defense counsel's deficient performance, and the opinion of the Court of Appeals was respectfully incorrect in its holding otherwise. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing argument, certiorari should be granted to allow full briefing on this matter.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of June, 2024.

RECEIVED
Jun 10 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2024-UP-117 (S.C. Ct. App. Filed April 10, 2024)

Lower Court Case No. 2014-GS-08-00313

SHANA ROBINSON,

PETITIONER

V.

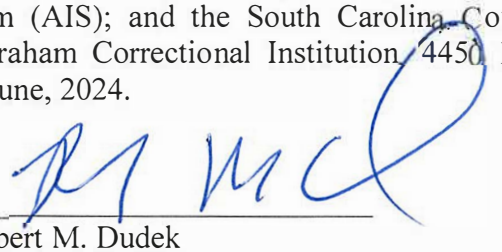
STATE OF SOUTH CAROLINA,

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 petition for writ of certiorari to the Court of Appeals and appendix 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 the South Carolina Court of Appeals; and on Shana Robinson, #360268, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 10th day of June, 2024.



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From:	Pollard, Shelby
To:	Danielle Dixon; Vickie Hall
Cc:	Dudek, Robert
Subject:	2018-002216 Shana Robinson v. The State - Petition for Writ of Certiorari to the Court of Appeals
Date:	Monday, June 10, 2024 11:57:00 AM
Attachments:	Cover Letter to AG 6.10.24 COA Cert.pdf 2018-002216 Shana Robinson v. The State - Petition for Writ of Certiorari to the Court of Appeals.pdf

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Good Afternoon,

Attached for service in the above-referenced case is the Petition for Writ of Certiorari to the Court of Appeals. This will be filed today, June 10, 2024, with the Supreme Court via email filing.

Thank you,
Shelby

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