

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Hampton County

Honorable G.D. Morgan, Jr., Circuit Court Judge
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Jun 12 2024

S.C. SUPREME COURT

MAURICE DEMON MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000044
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to request a hearing and challenge the reliability of the expert's opinion that a particular bullet was fired by a particular firearm?

STATEMENT

In June of 2016, the Hampton County Grand Jury indicted Petitioner, Maurice Demon Mitchell, for murder, burglary first degree, possession of a weapon during the commission of a violent crime and possession of cocaine base, indictments #2015-GS-25-369, 373, 375, 2016-GS-25-229. (App. pp. 408-415). On November 27, 2017, Petitioner proceeded to jury trial before the Honorable Roger Young. Stephen T. Plexico represented Petitioner at trial. Solicitor Isaak McDuffie Stone and Deputy Solicitor Sen P. Thorton prosecuted the case. The jury returned verdicts of guilty as charged. Judge Young sentenced Petitioner to life without parole for murder and burglary, five (5) years concurrent for the weapon charge and three (3) years concurrent for the drug charge. (App. pp. 416-419). A timely notice of intent to appeal was served on November 30, 2017. On September 17, 2018, a brief was filed on Petitioner's behalf pursuant to Anders v. California, 386 U.S. 738 (1967). On June 26, 2019, the South Carolina Court of Appeals dismissed the appeal. State v. Mitchell, No. 2019-UP-228 (S.C. Ct.App. filed June 26, 2019).

On August 12, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 420-429). The State filed a return on July 2, 2020. (App. pp. 430-439). An amended PCR application was referenced during the evidentiary hearing. (App. p. 440; p. 447, line 12 – p. 448, lines 1-25). On November 18, 2022, the evidentiary hearing was held before the Honorable G.D. Morgan. James K. Falk represented Petitioner at the PCR hearing. Lauren Mims represented the State. In a written order signed December 12, 2023, Judge Morgan denied relief and dismissed the application. A timely notice of intent to appeal was served on January 11, 2024. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to request a hearing and challenge the reliability of the expert's opinion that a particular bullet was fired by a particular firearm.

The jury found Petitioner guilty of the fatal shooting and beating of Eddie Mole on October 28, 2015. Shelleveese and Rodney Stokes lived in the apartment next door to the deceased. (App. p. 34, line 21 – p. 35, lines 1-3; p. 45, lines 1-5). On the day of the incident the Stokes saw a man with a gun standing over the deceased. (App. p. 35, line 19 – p. 36, lines 1-25; p. 45, lines 16-24). Shelleveese Stokes testified that the man she saw standing over the deceased also lived in the apartment complex. (App. p. 36, lines 6-17). The Stokes called 911 and officers with the Hampton Police Department arrived at the apartment complex. (App. p. 37, lines 13-16; p. 20, line 15 – p. 21, lines 1-21). Sergeant Rhett Long with the Hampton Police Department saw a suspect run into the woods. (App. p. 21, lines 2-6). Petitioner was arrested coming out of the woods behind the apartment complex. (App. p. 56, line 14 – p. 57, lines 1-7). A gun was recovered near the woods. (App. pp. 140 -141). The Stokes identified Petitioner as the man they saw standing over the deceased. (App. p. 40, lines 2-21; p. 48, line 6 – p. 49, lines 1-25).

At trial Agent Michelle Eichenmiller with the South Carolina Law Enforcement Division [SLED] was qualified, without objection, as an expert in the field of firearms identification. (App. p. 291, lines 9-12). Agent Eichenmiller testified, without objection, that a bullet and a cartridge case recovered at the scene were fired by the gun found near the woods. (App. p. 293, line 7 – p. 294, lines 1-14). The agent testified, “After physical and microscopical examination, I concluded that that bullet was fired by that firearm.” (App. p. 294, lines 6-8). As to the cartridge case, the agent testified, “After physical and microscopic examination of the cartridge case to the

test fires, I concluded that that cartridge case was fired by that firearm.” (App. p. 294, lines 11-13).

In the amended PCR application Petitioner alleged that, “Trial counsel was ineffective for not seeking a hearing pursuant to State v. Council, 335 S.C. 1 (1999) to challenge the reliability of agent Michelle Eichenmiller’s expert testimony in the field of tool marks and firearm identification. Specifically, whether the witness could opine that the Exhibit 36 (recovered bullet) was fired from State’s Exhibit 9. Record on Appeal 294 line 5.” (App. p. 440). During the PCR hearing when asked about the failure to request a hearing trial counsel testified, “Yes. And I should have done that. And I know to do that now, but I don’t think anybody was - - that I know of around the State was doing it back then.” (App. p. 457, lines 9-11).

In the order of dismissal the PCR judge wrote:

Initially, Applicant did not prove prejudice. Critically, there was no issue at trial as to whether subject gun was the gun used in the shooting. Thus, even if the expert witness should not have been allowed to testify the gun was an exact match, this testimony was not prejudicial. Further, even if counsel had challenged the reliability of this testimony under Jones - the proper standard in South Carolina - Applicant did not set forth sufficient argument or caselaw to show it is reasonably likely this testimony, upon further challenge, would have been excluded as unreliable. Finally, based on the overwhelming evidence against Applicant, it is not reasonably likely the outcome would have been different had counsel successfully excluded this testimony. Specifically, two eyewitnesses identified Applicant, law enforcement arrested Applicant while he was fleeing the scene, and Applicant admitted he forced his way into Victim’s home with a gun. Based on the foregoing, it is not reasonably likely the outcome would have been different had counsel objected to Eichenmiller’s testimony, and this claim is denied.

Further, this Court finds Applicant did not prove deficiency. The expert testimony here related to identifying firearm markings on cartridge casings is common testimony in South Carolina by experts in this field; thus, counsel’s failure to challenge the reliability of this testimony did not fall outside of prevailing professional norms. Likewise, Applicant did not show a reasonable likelihood this testimony would have been excluded under Jones. Although Applicant loosely cited to “Massachusetts Federal cases” that have challenged the admissibility of this type of testimony, he did not set forth with specificity *what*

cases he was relying on, and he acknowledged no South Carolina case had questioned the reliability of gun mark evidence. To the extent Applicant contends counsel was deficient for not challenging the existing standard, attorneys are not required to anticipate changes to the law to be constitutionally effective.

(App. p. 487 n. 2 omitted. Citation omitted). The PCR judge erred. Trial counsel was ineffective for failing to request a hearing and challenge the reliability of the expert's opinion that a particular bullet was fired by a particular firearm.

Rule 702 of the South Carolina Rules of Evidence provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In State v. Wallace, 440 S.C. 537, 544, 892 S.E.2d 310, 313 (2023), the South Carolina Supreme Court wrote, "To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: 'the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.' Council, 335 S.C. at 20, 515 S.E.2d at 518." Trial counsel was ineffective in failing to request a hearing and require the State to attempt to prove that the agent's "match" testimony was supported by reliable science.

While firearm identification testimony has generally been found admissible, the reliability of this kind of expert testimony has come under scrutiny. See David H. Kaye, Firearm-Mark Evidence: Looking Back and Looking Ahead, 68 Case W. Res. L. Rev. 723, 724 (2018).

As the United States District Court for the District of Massachusetts wrote:

Courts have understandably been gun shy about questioning the reliability of firearm identification evidence. See Santiago, 199 F.Supp.2d at 111–12 ("The Court ... can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment."). Accord United States v. Foster, 300

F.Supp.2d 375, 377 n. 1 (D.Md.2004) (noting that “[b]allistics evidence has been accepted in criminal cases for many years”); United States v. O’Driscoll, 2003 WL 1402040 at *1, 2003 U.S. Dist. LEXIS 3370 at *4 (M.D.Pa. Feb. 10, 2003). Storm clouds, however, are gathering. See Sexton v. State, 93 S.W.3d 96 (Tex.Cr.App.2002) (rejecting matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); Ramirez v. State, 810 So.2d 836 (Fla.2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

United States v. Monteiro, 407 F. Supp. 2d 351, 364 (D. Mass. 2006)(n. 1 citing United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) omitted).

In limiting the firearm identification testimony in United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005), the United States District Court for the District of Massachusetts wrote:

Putting together this precedent with the evidence I have heard, suggests admission but with limitations, limitations identical to those I adopted in *Hines*. O’Shea is a seasoned observer of firearms and toolmarks; he may be able to identify marks that a lay observer would not. But while I will allow O’Shea to testify as to his observations, I will not allow him to conclude that the match he found by dint of the specific methodology he used permits “the exclusion of all other guns” as the source of the shell casings. Defense will be permitted full and fair cross-examination.

While trial counsel may not have had a challenge to Agent Eichenmiller’s qualification as an expert, trial counsel should have requested a hearing and required the State to attempt to establish the reliability of the expert’s exact match opinion. If the State was unable to establish that the expert’s exact match opinion was reliable, counsel could then move to limit the expert’s testimony.

In limiting the firearm identification testimony in Monteiro the Massachusetts District Court explained that, “[b]ecause an examiner’s bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a ‘match’ to an absolute certainty, or to an arbitrary

degree of statistical certainty[,]” and “[a]llowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology.” 407 F. Supp. 2d at 372.

The Massachusetts courts are not alone in limiting firearm identification testimony. In United States v. Ashburn, 88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015), the United States District Court for Eastern District of New York wrote:

Based on the court's review of the field of toolmark and firearms identification, including the NAS Report upon which Laurent relies, and on this court's review of Daubert proceedings performed in other cases, an instruction limiting LaCova's testimony is appropriate. See, e.g., Willock, 696 F.Supp.2d at 549 (precluding expert from stating opinions and conclusions with any degree of certainty and precluding expert from stating that it was a “practical impossibility” that any other firearm fired the cartridges in question); Taylor, 663 F.Supp.2d at 1179 (limiting expert to an opinion that his conclusion was “to a reasonable degree of ballistic certainty”); Glynn, 578 F.Supp.2d at 574 (limiting expert ballistics opinion to statement that match was “more likely than not”); Diaz, 2007 WL 485967, at *14 (precluding experts from testifying that their conclusions were “to the exclusion of all other firearms in the world” and limiting description of certainty to a “reasonable degree of certainty in the ballistics field”); Monteiro, 407 F.Supp.2d at 372 (limiting testimony to a “reasonable degree of ballistic certainty”); Green, 405 F.Supp.2d at 124 (precluding expert from testifying that his methodology permitted “the exclusion of all other guns”).

The court in Ashburn cited Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under both Daubert and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and Rule 702, SCRE, trial counsel should have requested a hearing to determine the reliability of the match testimony and move to limit the testimony if the State was unable to show that the science was reliable.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117,

386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in failing to request a hearing and challenge the reliability of the expert's exact match opinion. Petitioner was prejudiced by trial counsel's deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of June, 2024.

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RESPONDENT


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice Demon Mitchell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge G.D. Morgan, Jr., which was held on November 18, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Maurice Demon Mitchell.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of June, 2024.

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Jun 12 2024

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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