

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
R. Lawton McIntosh, Circuit Court Judge

RECEIVED

AUG 26 2013

S.C. Supreme Court

ROBERT EARLE RICKETTS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213611

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel's failure to investigate and present an expert witness to challenge the state's theory of the case violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where there was conflicting testimony as to who fired the fatal shot killing the decedent and wounding the decedent's sister?

STATEMENT

An Anderson County Grand Jury indicted Petitioner at the August 31, 1999 term of General Sessions for murder, assault and battery with intent to kill, assault with intent to kill, and possession of a firearm during the commission of a violent crime. App. 759-766. Petitioner's case was called to trial on October 11, 1999 before the Honorable H. Dean Hall, and a jury. Assistant solicitor Druanne D. White appeared on behalf of the prosecution, and James "Skip" Goldsmith represented Petitioner. App. 1. On October 14, 1999, the jury found Petitioner guilty of all charges as indicted. App. 554, ll. 5-22. He was sentenced by the Honorable H. Dean Hall to life imprisonment for murder, twenty years consecutive for assault and battery with intent to kill, ten years concurrent for assault with intent to kill, and five years concurrent for the weapons charge. App. 558, ll. 9-24.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Joseph L. Savitz, III. The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Ricketts, Op. No. 2002-UP-235 (S.C. Ct. App. Filed March 28, 2002); App. 567.

On May 23, 2002, Petitioner filed an application for post-conviction relief (PCR). App. 562-588. The State filed a return to this application dated October 5, 2004. App. 589-592. On March 9, 2005, Petitioner filed a memorandum in support of application for post-conviction relief. App. 594-603. By and through his counsel, Raymond Mackay, Petitioner filed a motion for an order allowing testing of certain evidentiary items on June 26, 2006, and an order allowing testing of certain evidentiary items was issued on January 22, 2008. App. 604-608; App. 609-610.

A telephonic deposition of Ara Nalbandian, a metallurgical evaluation expert, was conducted on November 11, 2009. App. 647-683. Assistant Attorney General A. West Lee represented the state, and Raymond Mackay represented Petitioner. App. 649. The state did not object to Nalbandian's qualification as an expert. App. 653, ll. 16-20.

The matter proceeded to an evidentiary hearing on June 15, 2010 before the Honorable R. Lawton McIntosh. App. 611-683. Assistant Attorney General A. West Lee represented the state, and Raymond Mackay represented Petitioner. App. 611. The deposition of Ara Nalbandian was admitted into evidence by Judge McIntosh at this hearing. App. 639.

A second evidentiary hearing was held on March 15, 2011 again before the Honorable R. Lawton McIntosh. App. 684-748. Assistant Attorney General David Spencer represented the state, and Raymond Mackay represented Petitioner. App. 684. By order dated March 28, 2012, Judge McIntosh denied Petitioner relief. App. 749-758.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to investigate and present an expert witness to challenge the state's theory of the case violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where there was conflicting testimony as to who fired the fatal shot killing the decedent and wounding the decedent's sister.

Evidence at Trial

On the afternoon of June 21, 1999, Petitioner and his newly estranged wife, Renee Billadeau, were talking in her front yard when Renee's sisters, Dee Garrett and Dawn Billadeau, arrived. App. 320, ll. 6-21. Anticipating an altercation with Petitioner, Dawn had armed herself with a .357 Magnum revolver. App. 335, l. 23 – 335, l. 10; App. 319, ll. 8-24. Petitioner had a Browning .300 Winchester Magnum rifle in his vehicle. App. 414, ll. 10-12; App. 376, ll. 2-4.

Moments later, Petitioner and Dawn Billadeau were shooting at each other. The record contains conflicting accounts about who initiated the gunfight. According to the state's witnesses (Dee Garrett, Dawn Billadeau, Dana Ricketts, and Cory Ricketts), Petitioner pulled his rifle from the car without provocation, shot Dee in the leg, and then turned the gun on Renee, shooting her in the side, and killing her almost instantly. According to their account, Petitioner then turned the gun toward Dawn, who returned fire, shooting Petitioner in the right shoulder and the chin. App. 79, l. 2 – 81, l. 17; App. 135, l. 12 – 137, l. 17; App. 321, l. 8 – 323, l. 3; App. 336, l. 11 – 337, l. 15.

Petitioner, on the other hand, testified that Dawn shot at him as he was getting into his car to leave and that he returned fire in her general direction as he fell to the ground after being shot. App. 419, l. 24 – 421, l. 3. Petitioner's account is corroborated by a neighbor, Linda Gail White, who heard the firing of weapons and witnessed part of the incident. App. 229, l. 1 – 231, l. 6. An examination of Dawn's revolver revealed that she had fired five shots while three fired cartridge

cases recovered from the scene were identified as being fired by Petitioner's rifle. App. 381, ll. 13-20; App. 380, ll. 3-9.

Petitioner's defense at trial consistently remained that Dawn accidentally shot the decedent and her other sister during the exchange of gunfire and that Petitioner was acting in self-defense when he fired in Dawn's general direction. Trial counsel told the jury during opening statements that "the defense will prove that the killer, the person who fired the fatal shot, was her own sister, Dawn Billadeau . . ." App. 71, ll. 13-16. Petitioner testified that projectiles from Dawn's gun had inflicted injuries on the decedent and Dee. App. 437, ll. 16-24.

SLED Agent David Collins testified for the state as an expert in firearms examination. App. 375, ll. 14-18. He testified that he was unable to do any tool mark comparison testing with the bullet fragments recovered from the decedent's body during autopsy because the fragments were too small and too badly damaged. App. 382, l. 16 – 383, l. 4. The fragments were "unsuitable for identification with any firearm." App. 383, ll. 7-9. Therefore, the state's expert was unable to determine which gun, Petitioner's rifle or Dawn's revolver, the bullet fragments recovered from the decedent's body came from and, consequently, who fired the fatal shot.

Dr. Brett Woodard, the pathologist who conducted the autopsy on the decedent, testified that the cause of death was a gunshot wound to the abdomen that caused massive destruction of the abdominal organs. App. 263, l. 24 – 264, l. 3. He further concluded that the weapon that killed the decedent "beyond a reasonable doubt" was a "high-velocity weapon, a hunting type rifle." App. 264, ll. 4-6. He explained that hunting rifles have more energy associated with the round than a handgun and, based on the decedent's injuries, including multiple tears in the spleen, kidneys, and liver, she would have had to have been shot with a high-powered rifle, not a handgun. App. 257, l. 15 – 259, l. 11.

Dr. Woodard's testimony went unchallenged by the defense who failed to present any of its own expert witnesses.

Evidence at PCR

During his testimony at the PCR hearing, Petitioner confirmed his defense at trial was that Dawn shot and killed the decedent and wounded Dee and that Petitioner only shot at Dawn in self-defense. App. 625, l. 24 – 626, l. 2; App. 630, l. 13 – 631, l. 9.

Petitioner testified that he retained trial counsel, James "Skip" Goldsmith, approximately five months before trial. He thinks he and his family paid Mr. Goldsmith around \$5,000 to \$6,000 before trial and after trial Petitioner gave Goldsmith the title to his Camaro. App. 626, l. 13 – 627, l. 8; App. 634, ll. 2-6.

Petitioner testified that he told Mr. Goldsmith to "have those bullets tested because they won't match my rifle.' I know it couldn't match my rifle. . . I asked him, I told him, I said, 'We need experts to get them bullets and test them, because I knowed they weren't going to come back to my rifle.'" App. 626, ll. 2-10. Petitioner stated that Goldsmith never sent any of the evidence to be evaluated by a forensic expert despite the fact Petitioner had requested he do so. Petitioner testified that Goldsmith told him they did not need an expert and that he was "going to the house." App. 628, ll. 9-15; App. 633, ll. 15-25. However, the state presented unchallenged evidence that the bullet that killed Petitioner's wife "would have been from a gun like mine" and Petitioner was subsequently convicted of all counts. App. 634, l. 23 – 635, l. 7.

Ara Nalbandian testified for Petitioner in a deposition that was admitted into evidence by Judge McIntosh. App. 639, ll. 7-13. Nalbandian was qualified as an expert in metallurgical evaluation without objection from the state. App. 653, ll. 16-20. He has a Bachelor's degree in mechanical engineering and a Master's degree in industrial management both from the University

of Rhode Island. App. 652, l. 22 – 653, l. 6. He has worked in the field of metallurgical evaluation for over thirty five years and has been qualified as an expert in court in metallurgical evaluation over ten times. App. 652, ll. 2-12; App. 653, ll. 7-15.

Mr. Nalbandian used a scanning electro microscope combined with energy dispersive x-ray spectroscopy to identify the chemical composition of one of the unfired rifle bullets used by Petitioner the day of the shooting, one of the unfired revolver bullets used by Dawn, and the two projectiles recovered from the decedent's body. This type of testing is "very accurate" and has been around for thirty five years, meaning it was available to the defense in 1999. App. 680, ll. 12-14; App. 656, l. 21 – 657, l. 15.

After conducting the testing, Nalbandian concluded that the rifle bullet was composed almost entirely of copper and nonmetallic materials, that the revolver bullet was composed of lead and tin, and that the two projectiles recovered from the decedent's body also consisted of lead and tin. App. 660, l. 5 – 661, l. 9; App. 664, l. 7 – 665, l. 3; App. 665, ll. 4-18. Based on these results, Nalbandian concluded that the bullet fragments recovered from the decedent's body *could not have come from the rifle bullet* because their materials are not consistent with each other. App. 665, l. 19 – 666, l. 14; App. 681, ll. 13-18.

Trial counsel Goldsmith also confirmed at the PCR hearing that his theory of the case at trial was that the decedent's sister, Dawn Billadeau, fired first intending to shoot Petitioner, but ultimately shooting and killing decedent. App. 698, ll. 1-17. When questioned whether he would have utilized the services of Mr. Nalbandian, trial counsel Goldsmith answered, "Absolutely, I would have used that expert. From a defense point of view, I don't have to prove my case beyond a reasonable doubt. I just have to introduce some doubt. And I would have utilized the services of this gentleman and introduced that report had it been available, absolutely." App. 704, l. 25 – 705, l. 7.

Goldsmith testified that at the time of trial he contemplated hiring some sort of ballistics expert to help neutralize the state's experts. App. 700, l. 2 – 701, l. 8.

Goldsmith cited financial reasons for not hiring an expert. He “absolutely could not hire an expert. There was no money to do that.” App. 707, ll. 4-5. Goldsmith testified that he was retained by Petitioner's family for a fee of \$15,000 and Petitioner was to pay all costs, but Goldsmith only ever received about \$2,000. He did not feel obligated under the retainer agreement to pay for any costs and he was not in a position to advance money for costs. “So I knew going in that there was no money to pay for an expert.” App. 700, ll. 8-19. Goldsmith admitted that at no time did he ask the court for financial assistance in hiring experts nor did he ask to be relieved as counsel for Petitioner's failure to comply with the retainer agreement. App. 708, l. 12 – 709, l. 14.

SLED Agent Jennifer Stoner was the last PCR witness. She testified for the state as an expert in trace evidence to counter the testimony of Mr. Nalbandian. App. 717, ll. 5-13. Agent Stoner has a Bachelor's degree in chemistry from California University of Pennsylvania. She completed the Criminal Justice Academy and an internship at SLED in the trace evidence department before being hired by SLED. Once hired by SLED, she completed a three year training program in trace evidence from 1998 until 2001. App. 714, l. 5 – 715, l. 20.

Agent Stoner testified that SLED utilizes several scanning electron microscopes to analyze metals. App. 715, l. 21 – 716, l. 21. SLED has had requests in the past to do bullet to bullet fragment comparisons trying to match a certain box of ammunition to a specific projectile. However, SLED refuses to do such testing because the ratios of lead to antimony even within a single box of ammunition can vary significantly and the testing would thus be unreliable. App. 718, l. 5 – 719, l. 2. Therefore, Agent Stoner concluded SLED would not have performed the type of testing Nalbandian performed in this case.

Stoner also testified that normally when one finds a projectile in a body at autopsy that projectile is the core of the bullet because the rest of the bullet usually breaks away in the process of being fired and impacting with an object or person. Because Nalbandian only x-rayed the outer portion of the projectile and did not break open the bullet to test its core, Agent Stoner had concerns about his results. App. 719, ll. 3-23.

Lastly, Agent Stoner claimed that Nalbandian did not perform the testing for a long enough period of time. When she performs such testing she usually collects data for two hundred seconds at a minimum to around fifteen hundred seconds at a maximum. However, Nalbandian only collected data for approximately fifty seconds. This also caused her some concern. App. 726, ll. 3-24.

Order of Dismissal

The PCR judge concluded trial counsel's performance was not deficient. It found trial counsel's performance during trial revealed considerable preparation and challenge to the state's evidence and that trial counsel could not have reasonably known that any benefit would have accrued to Petitioner from such testing. App. 756-757.

The PCR court also determined that Mr. Nalbandian's expert testimony was inconclusive as to the composition of the rifle bullet and that the state presented overwhelming evidence of guilt at trial. The court therefore concluded that Petitioner did not meet his burden of proving ineffective assistance of counsel and dismissed his application. App. 757.

Discussion

It is clear that justice was not served in this case and that Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate and retain an expert to combat the state's theory of the case where there was conflicting testimony as to who shot and killed the decedent.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Furthermore, the United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (finding “[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation”) (internal quotation omitted). The United States Supreme Court has also held that “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith, 539 U.S. 510, 527 (2003).

In this case, trial counsel’s performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel was aware of the

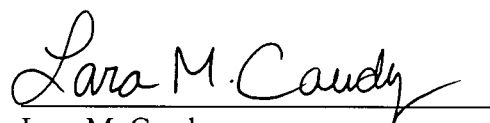
conflicting accounts as to who initiated the gunfight, yet he failed to hire any experts that could have helped the jury determine who actually fired the fatal shot, possibly exculpating Petitioner from any guilt. Trial counsel stated that he would have loved to have hired an expert at trial and that it would have been the “optimum situation” to neutralize the state’s experts and other evidence. App. 700, ll. 4-8. Trial counsel’s *only* reasoning for not hiring an expert was that Petitioner did not fully comply with his retainer agreement and that trial counsel had no money to do so. Trial counsel at *no time* stated that he did not think the defense needed an expert to help combat the state’s theory of the case. Instead, he consistently cited *solely* financial reasons for his failure to do so. Despite knowing from the beginning that he would not be able to afford to hire an expert, trial counsel also failed to seek any assistance from the court or to request funds from the Commission on Indigent Defense. Based on the conflicting evidence as to who fired the fatal bullet, a reasonable defense attorney would have investigated further and retained the services of an expert.

Petitioner was prejudiced because trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel’s failure to conduct a reasonable investigation left the state’s expert testimony that Petitioner’s gun inflicted the fatal wound unchallenged. Presenting the testimony of an expert, such as Ara Nalbandian, would have created reasonable doubt in the minds of the jurors and changed the outcome at trial. Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
R. Lawton McIntosh, Circuit Court Judge

ROBERT EARLE RICKETTS,

PETITIONER,

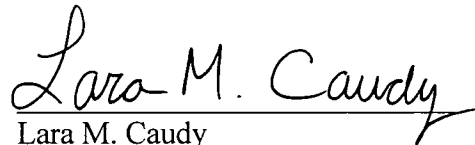
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of August, 2013.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of August, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.