

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Lexington County

Honorable Daniel McLeod Coble, Circuit Court Judge
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WILLIAM CRAIG CAUGHMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000060
—————

PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Did the post-conviction relief court err finding defense counsel was not deficient for failing to retain an independent pathologist where petitioner's defense at trial was that decedent died as a result of negligent care while hospitalized *not* as a result of injuries sustained in the automobile accident as the state alleged and where petitioner was prejudiced by counsel's deficiency where the jury only considered the opinion of the state's pathologist who testified decedent died as a result of his injuries from the accident?

STATEMENT

In May 2013, a Lexington County grand jury indicted petitioner for hit and run accident resulting in death and obstruction of justice. App. 645-46; 745. On May 20, 2013, petitioner's case was called to trial before the Honorable Clifton Newman and a jury.¹ App. 1-483. Wayne Floyd represented petitioner.² App. 1. Assistant solicitors, Suzanne Mayes and Robert McNair, represented the state. App. 1.

Judge Newman granted petitioner's motion for directed verdict as to obstruction of justice. App. 420-24; 442, l. 5-443, l. 15; 444, ll. 4-20; 446, ll. 9-10. The jury found petitioner guilty of hit and run accident resulting in death. App. 464, ll. 9-14. Judge Newman sentenced petitioner to twenty years' imprisonment. App. 482, ll. 18-21.

On May 31, 2013, defense counsel filed a motion for new trial and reconsideration of sentence. App. 484-87. A hearing was held on the motions on May 21, 2015. App. 488-535. Judge Newman denied petitioner's motions by written order. App. 537.

Petitioner through his appellate defender appealed his conviction and sentence arguing 1) the trial court erred denying petitioner's motion to suppress evidence where police lacked jurisdiction to execute a search warrant on his property because the multi-jurisdiction agreement was invalid; and 2) the trial court erred considering petitioner's alleged alcohol use, where there was conflicting evidence presented on the issue and where the trial court suggested during sentencing things might have been different if petitioner had not been drinking. App. 746. Following briefing and oral argument the Court of Appeals affirmed petitioner's conviction and

¹ Portions of trial were missing or inaudible. Two hearings, September 16, 2016, and May 1, 2017, were held in an effort to reconstruct those missing or inaudible portions of trial so that meaningful appellate review would be possible. App. 538-644.

² Mr. Floyd was deceased at the time of petitioner's evidentiary hearing.

sentence. *State v. Caughman*, Op. No. 2020-UP-009 (S.C. Ct. App. filed Jan. 15, 2020).

Subsequently, petitioner filed an application for post-conviction relief (PCR). App. 648-67. On October 24, 2023, an evidentiary hearing was held before the Honorable Daniel Coble. App. 690-734. Ola Johnson represented petitioner and Donald Zelenka, assistant attorney general, represented the state. App. 690.

On December 19, 2023, Judge Coble signed an order denying PCR. App. 743-794. The court found petitioner “failed in his burden of proof in showing that counsel was deficient or prejudicial in failing to take steps to acquire the additional hospital records beyond the autopsy report or seek a pathologist to independent[ly] review those records.” App. 787-88.

The court found regardless of trial counsel’s failure to call an independent expert counsel was “well prepared with the information he had concerning the circumstances of the victim’s death from the autopsy report” and “[h]e utilized the information in his ‘vigorous’ cross-examination.” App. 790. Trial counsel was deceased at the time of petitioner’s evidentiary hearing. However, the PCR court intuited defense counsel’s strategy from the trial transcript and post-trial motions. App. 789. The court concluded defense counsel’s strategy was to identify matters that could have shown the accident may have caused great bodily injury but did not cause death, however he did not retain an independent pathologist to review the autopsy report or assist in receiving additional medical information. App. 789. Lastly, the court found that even if counsel was deficient in this regard petitioner failed to show any resulting prejudice. App. 791.

This petition follows.

ARGUMENT

The post-conviction relief court erred finding defense counsel was not deficient for failing to retain an independent pathologist where petitioner's defense at trial was that decedent ultimately died as a result of negligent care while hospitalized not as a result of injuries sustained in the automobile accident as the state alleged and where petitioner was prejudiced by counsel's deficiency where the jury only considered the opinion of the state's pathologist who testified decedent died as a result of his injuries from the accident.

Relevant facts

On February 21, 2010, Toby Morriss (decedent) was struck by a vehicle while riding his motorcycle. App. 82, ll. 2-18; 646. Detective Periera testified that he visited Morriss at Lexington Medical Center in the days following the accident. Periera stated Morriss was "coherent" and was scheduled to be released from the hospital. App. 341, ll. 8-18. Seven days after the accident, February 28, 2010, Morriss died in the hospital. App. 349, ll. 9-11.

Decedent's close friend, Jennifer Prather, testified that before the motorcycle accident he was in good health and was very active. She testified Morriss did not have any injuries or fractures before the accident. App. 85, l. 15-86, l. 10. Prather visited Morriss at Lexington Medical Center hours after the accident. She described him as "pretty beat up" and "conscious but a little confused." App. 88, ll. 14-23. Prather testified Morriss was scheduled to be discharged from Lexington Medical on March 1. She said while he was in the hospital Morriss had begun rehabilitation including walking up stairs. App. 93, ll. 3-23.

State's witness, Doctor Elizabeth Moffatt, testified as an expert in pathology and discussed her findings and opinions regarding cause of death. App. 346-71. Doctor Moffatt testified that she performed the autopsy of decedent on March 1, 2010. App. 349, ll. 7-8.

Moffatt's findings after autopsy were decedent had suffered blunt force trauma and sustained the following injuries: bilateral rib fractures, pulmonary contusions, left wrist fracture, hematomas in the area of the adrenal glands and around the pancreas, and thoracic vertebral fractures. App. 360-362. She opined the cause of death was a pulmonary embolus, a blood clots. App. 364, l. 13-365, l. 10. Moffatt explained the most common cause of blood clots is immobility. She went on to describe that almost all blood clots are caused by some risk factor and only a very small percentage "have a spontaneous land and most probably just don't have an identifying cause." App. 365, ll. 15-19. Moffatt opined the blood clot causing decedent's death was the result of trauma sustained from the accident. App. 366, ll. 18-25.

Closing arguments were not transcribed.³ App. 446, ll. 23-25.

The trial court instructed the jury as to accident resulting in death and accident resulting in great bodily injury. App. 455-57. The trial court also instructed the jury that "gross negligent or intentional activity on the part of the practitioner would relieve the [d]efendant of liability." App. 458, ll. 1-22.

At the evidentiary hearing PCR counsel asserted that he previously moved for funding to hire an expert in pathology to testify at the evidentiary hearing. PCR counsel's motion for funding to hire an independent pathologist was denied by the court. App. 696, ll. 12-23. The PCR order acknowledges the same in footnote nine. App. 787.

Petitioner indicated his first attorney, Mr. Breibart, planned to retain an independent pathologist for trial.⁴ App. 701, ll. 14-24. He testified the jury was not presented any evidence,

³ During the reconstruction hearing defense counsel testified he had no independent recollection of closing arguments. App. 584, ll. 18-24. Appellate counsel argued the record could not be reconstructed because, among other things, neither defense counsel nor assistant solicitor had recollection of the closing arguments that the record could not be reconstructed. App. 615, l. 15-616, l. 21; 632, ll. 20-22. Ultimately the court found the record was "adequately reconstructed the essence" of the transcript. App. 642, ll. 1-11; 795-806.

other than defense counsel's cross-examination of Dr. Moffatt, that a blood clot could have been caused by anything other than the accident. App. 708-09.

Discussion

Defense counsel was ineffective for failing to retain an independent pathologist for petitioner's trial where counsel's theory of the case and the defense presented at trial was that decedent's death was caused by hospital negligence and *not* injuries sustained in the accident.

Counsel must provide reasonably effective assistance under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. To receive relief, the applicant must show (1) counsel was deficient and (2) counsel's deficiency caused prejudice. *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009). Prejudice is defined as “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 693. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Id.* at 700.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. “[A]t a minimum, counsel has the 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, 642 S.E.2d 590, 597 (2007) (emphasis omitted) (citation omitted). “[A] particular decision not to

⁴ Initially, petitioner retained Richard Breibart to represent him in this case and subsequently Mr. Breibart was suspended and later disbarred from the practice of law. Wayne Floyd was later appointed as petitioner's attorney. App. 152, l. 22-153, l. 5; 693, ll. 10-15.

investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” *Strickland*, 466 U.S. at 691. “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690–91. “[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions[.]” *Id.* at 691.

“[T]he United States Supreme Court has held that the defendant must have ‘a fair opportunity to present his defense,’ thereby requiring the State to provide the ‘basic tools’ for an adequate defense to an indigent defendant.” *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68 (1985)). “Thus, although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts necessary to a meaningful defense[.]” *Id.*

Counsel was deficient for failing to support petitioner’s defense by retaining an independent pathologist. It was unreasonable for counsel to rely on cross-examination of the state’s expert and not have an independent expert to explain to the jury there were other ways decedent’s blood clot could have occurred. Having heard no testimony from a defense expert the jury was left with only the state’s expert opinion and no other evidence regarding cause of death.

In *Reeves v. State*, the Court of Appeals held Reeves’ counsel was deficient for failing to call a medical expert to challenge the state’s medical evidence and Reeves was prejudiced by counsel’s deficiency. 415 S.C. 366, 782 S.E.2d 747, (Ct. App. 2015). In that case the Court found counsel was deficient “because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial.” *Id.* at 377,

782 S.E.2d at 752. The Court also found counsel did not provide a legitimate trial strategy for failing to consult with or call their own medical expert at trial. *Id.*

While the PCR court assumed defense counsel's possible strategy, it is impossible to say what counsel's strategy was, if any, for failing to call an expert. *Contra Legare*, 333 S.C. at 281, 509 S.E.2d at 475 (stating that where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective); *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (providing an attorney's performance is not deficient if it is reasonable under professional norms). The trial court even suggested counsel might have called a defense expert at trial to which counsel did not respond. App. 357, ll. 16-19. Moreover, counsel did not articulate any strategy after trial at the post-trial hearing or reconstruction hearings when the issue came up in the context of additional medical records.

In *Reeves*, the Court found he was prejudiced by the deficiency where testimony by the expert at Reeves' PCR hearing explained there were alternative ways the injury could have occurred. *Reeves v. State*, 415 S.C. 366, 378, 782 S.E.2d 747, 753 (Ct. App. 2015). Those explanations were not presented at trial. *Id.*

As the PCR court noted generally an applicant must produce the testimony or evidence they suggest should have been presented at trial to prove prejudice. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). However, here the fact that PCR counsel was denied his request for funding should be considered in the analysis of prejudice. Petitioner was prejudiced by counsel's deficiency where the jury did not have any evidence of hospital negligence to consider during deliberations. Ultimately the jury only had the opinion of the state's expert to consider and defense counsel's speculation through his cross examination of the state's pathologist. Without evidence supporting defense counsel's theory the jury was unable to

come to any other conclusion regarding cause of death.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2024.