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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Jennifer B. McCoy, Circuit Court Judge

ROGER D. GRATE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000570

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the post-conviction relief court err by finding appellate counsel was not ineffective where counsel failed to argue on appeal that the trial court abused its discretion by admitting numerous gory photographs of the decedent in violation of Rule 403, SCRE, since the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and where Petitioner was prejudiced by counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's direct appeal would have been different if counsel had properly raised the issue?

STATEMENT OF THE CASE

On December 25, 2016, people gathered at Petitioner's house to celebrate Christmas. App. 625, ll. 17-25. When Petitioner learned that his stepson, Gregory Grate, had not given Petitioner's wife, who was Gregory's biological mother, a Christmas present, Petitioner walked outside to discuss the matter with Gregory. App. 598, l. 7 – 599, l. 22; App. 626, ll. 3-24. The two argued, and at times, the argument was loud and heated. App. 626, ll. 15-24.

Darrell Doctor, who was Gregory's cousin, walked up to the two men to ask what was going on. App. 600, ll. 2-16; App. 627, ll. 8-14. Gregory and Petitioner told Doctor that it was none of his business. App. 600, ll. 17-24; App. 627, ll. 13-14. Gregory tried to convince Doctor to leave with him, but Doctor refused. App. 601, ll. 2-10; App. 603, l. 22 – 604, l. 16. Petitioner repeatedly told Doctor to leave, but Doctor refused. App. 627, ll. 14. When Doctor turned toward Petitioner, placed his hand in his pocket, and began walking aggressively toward Petitioner, Petitioner shot him once. App. 604, ll. 1-25; App. 627, l. 20 – 632, l. 6. Petitioner feared Doctor had a gun in his pocket. App. 629, l. 18 – 630, l. 11. Petitioner did not intend to shoot Doctor. Instead, he intended to shoot his gun in the air to scare Doctor. App. 631, ll. 15-25. Doctor fell to the ground and ultimately died from the gunshot wound. App. 388, ll. 19-23; App. 494, l. 23 – 495, l. 6; App. 498, ll. 5-8; App. 522, ll. 10-13.

Several individuals picked up Doctor and tried to put him into the car of James Grate, who was Doctor's cousin, but James refused to allow the individuals to place Doctor into his car. App. 555, l. 23 – 556, l. 4; App. 512, ll. 5-14; App. 521, ll. 8-21. Instead, a neighbor attempted to perform CPR. App. 377, ll. 18-22; App. 556, ll. 8-11. Shortly thereafter, the police arrived. App. 376, ll. 9-25. Petitioner, who had remained outside to wait for the police, told the responding officer that he had shot Doctor. App. 378, l. 14 – 380, l. 3; App. 383, l. 15 – 384, l.

23. App. 631, l. 12 – 632, l. 25. Additionally, Petitioner provided the officer with his gun and his identification. App. 385, ll. 4-13; App. 633, ll. 1-9. Further, Petitioner fully cooperated with police by providing them with a statement regarding what transpired before, during, and after the shooting. App. 633, l. 13 – 634, l. 18.

An Horry County grand jury indicted Petitioner on February 23, 2017 for murder and possession of a weapon during the commission of a violent crime. App. 1115-1118. A pretrial hearing pursuant to the Protection of Persons and Property Act was held on May 14-15, 2018 before the Honorable Larry Hyman. App. 1. Assistant Solicitors Christopher Helms and Katie Owens represented the state. Kia Wilson represented Petitioner. App. 1. At the conclusion of the hearing, Judge Hyman found Petitioner failed to prove by the preponderance of the evidence that he was entitled to immunity pursuant to the Act. App. 207, l. 12 – 208, l. 10.

Petitioner's case was called to trial on March 11, 2019 before the Honorable Steven H. John, and a jury. App. 210. Assistant Solicitors Christopher Helms and Katie Owens represented the state. Kia Wilson and DeShantell Singleton represented Petitioner. App. 210. On March 14, 2019, the jury found Petitioner guilty as indicted. App. 753, ll. 8-17. He was sentenced to thirty-five years for murder and five years concurrent for the weapons offense. App. 765, ll. 12-19.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Grate, 2021-UP-384 (S.C. Ct. App. Filed November 3, 2021); App. 823-825. By order filed September 7, 2022, this Court subsequently denied Petitioner's petition for writ of certiorari. App. 895.

On November 1, 2022, Petitioner filed an application for post-conviction relief (PCR). App. 896-909. The state filed a return to this application on December 2, 2022. App. 910-924. An evidentiary hearing was convened on September 18, 2023 before the Honorable Jennifer B.

McCoy. App. 925. Assistant Attorney General Suzanne Shaw represented the state. Steven Fowler represented Petitioner. App. 925.

Petitioner testified at the evidentiary hearing that appellate counsel was ineffective for failing to raise on appeal the trial court's admission of numerous gruesome photographs of the decedent with his "brains scattered out." Petitioner maintained that the photographs were extremely prejudicial because once the jury saw the photographs, Petitioner "was guilty then no matter what the facts" were. App. 975, l. 1 – 976, l. 1. Petitioner testified that it made no difference that the trial court required the state to change one of the graphic photographs to black and white since the photograph "still showed the brains coming out." App. 990, l. 14 – 991, l. 24.

Susan Hackett, Petitioner's appellate counsel, testified that she did not raise the trial court's admission of the photographs on appeal due to the standard of review, which is an abuse of discretion. She explained that the trial court held a lengthy hearing on trial counsel's objection to the photographs, reviewed each photograph the state sought to admit, excluded some photographs as cumulative, and required the state to change at least one photograph, State's Exhibit No. 20, from color to black and white.¹ Hackett testified, "I thought it would be very difficult to get an appellate court to say that Judge John [the trial judge] had abused his discretion when there was such a good record for him to show that he had in fact exercised his discretion and conducted the [Rule] 403 analyses." App. 1045, l. 20 – 1046, l. 14.

¹ Trial counsel objected to State's Exhibit Nos. 7, 9, 19, 20, 21, 24, 25, 26, 33, and 36 (all photographs). The trial court excluded State's Exhibit Nos. 21, 25, and 36 pursuant to Rule 403, SCRE. However, the court admitted State's Exhibit Nos. 7, 9, 19, 20, 24, 26, and 33 over trial counsel's objection. The trial court also ordered the photograph admitted as State's Exhibit No. 20 be changed from color to black and white. See App. 335, l. 6 – 354, l. 17.

By order filed March 25, 2024, the PCR court denied Petitioner relief. App. 1065-1114. The court found Petitioner failed to prove appellate counsel was ineffective for not challenging the trial court's admission of gory photographs on appeal. The court emphasized that appellate counsel is not required to raise every nonfrivolous issue on appeal. App. 1103. It found counsel asserted a valid strategic reason in not appealing the admission of the photographs. Further, the court concluded Petitioner failed to prove he was prejudiced by appellate counsel's alleged deficient performance. App. 1104.

Because Petitioner's right to the effective assistance of counsel was violated by appellate counsel's failure to argue on appeal that the trial court abused its discretion by admitting numerous gruesome photographs of the decedent in violation of Rule 403, SCRE, and Petitioner was prejudiced by counsel's deficient performance, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief court erred by finding appellate counsel was not ineffective when counsel failed to argue on appeal that the trial court abused its discretion by admitting numerous gory photographs of the decedent in violation of Rule 403, SCRE, since the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and where Petitioner was prejudiced by counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's direct appeal would have been different if counsel had properly raised the issue.

The post-conviction relief court erred by finding appellate counsel was not ineffective when counsel failed to argue on appeal that the trial court abused its discretion by admitting numerous gruesome photographs of the decedent in violation of Rule 403, SCRE, since the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Petitioner was prejudiced by appellate counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's direct appeal would have been different if counsel had properly raised the issue.

"A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Evitts v. Lucey, 469 U.S. 387, 398 (1985)). "However, counsel is not required to raise every nonfrivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome." Id. (citing Smith v. Robbins, 528 U.S. 259, 288 (2000)). "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel." Id. (citing Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)).

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) (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence.” Rule 403, SCRE.

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)) (internal quotation marks omitted). “Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). “If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” Collins, 409 S.C. at 534, 763 S.E.2d at 27 (quoting Nance, 320 S.C. at 508, 466 S.E.2d at 353) (internal quotation marks omitted).

“When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” Id. at

534, 763 S.E.2d at 27-28 (quoting State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). “To be classified as unfairly prejudicial, photographs must have a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” Torres, 390 S.C. at 623, 703 S.E.2d at 228-229 (quoting State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

In State v. Torres, 390 S.C. at 624, 703 S.E.2d at 229, our Supreme Court expressed to the bench and bar its concern over the admission of gruesome photographs, like the photographs admitted in this case. See Collins, 409 S.C. at 540, 763 S.E.2d at 30-31 (Pleicones, J., dissenting). The Court stated:

Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

Torres, 390 S.C. at 624, 703 S.E.2d at 229; See State v. Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023) (holding the trial court abused its discretion by admitting autopsy photographs pursuant to Rule 403, SCRE, because their minimal probative value was substantially outweighed by the danger of unfair prejudice).

In this case, appellate counsel was deficient for failing to raise on appeal the trial court’s admission of numerous gruesome photographs of the decedent, including close up photographs of the decedent’s head depicting brain matter. Appellate counsel correctly testified that the trial court conducted a lengthy *in camera* hearing on the admission of the photographs and carefully reviewed each one. See App. 335, l. 6 – 355, l. 2; App. 391, l. 22 – 396, l. 2. While this demonstrates the trial court exercised its discretion, it does not mean the court *correctly*

exercised its discretion. A trial court abuses its discretion when the “court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Here, the trial court abused its discretion because, as a matter of law, any probative value of the photographs was substantially outweighed by the danger of unfair prejudice to Petitioner given the extremely gruesome nature of the photographs. See State v. Jones, 440 S.C. 214, 262-63, 891 S.E.2d 347, 372-73 (2023) (holding the trial court abused its discretion by admitting autopsy photographs pursuant to Rule 403, SCRE, where as a matter of law, any probative value was substantially outweighed by the danger of unfair prejudice to Jones). Accordingly, appellate counsel was ineffective for failing to challenge the trial court’s admission of the photographs on appeal.

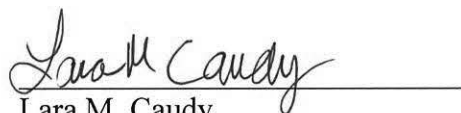
Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of Petitioner’s direct appeal would have been different if counsel had properly raised the issue. It is likely the appellate court would have held the trial court abused its discretion by admitting the gory photographs, like in Nelson and Jones, and reversed Petitioner’s convictions.

Respectfully, this Court should grant certiorari and hold the post-conviction relief court erred by denying Petitioner relief.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and remand for a new trial.

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
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2024.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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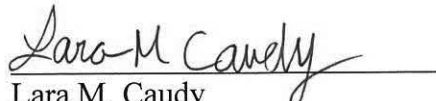
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roger D. Grate states:

1. She is an 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, which was held on September 18, 2023 before the Honorable Jennifer B. McCoy, 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 Roger D. Grate.

Respectfully Submitted,

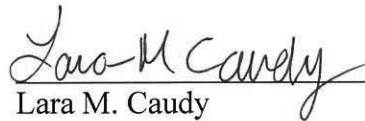

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2024.

CERTIFICATE OF COUNSEL

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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This 16th day of September, 2024.