STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County

Clifton Newman, Circuit Court Judge

ANTJUAN TOBIAS GREENE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001535

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1.

Did trial counsel's failure to adequately communicate a plea offer made by the state to Petitioner violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel?

2.

Did the PCR court err in finding Petitioner knowingly and voluntarily waived his right to testify at trial and that Petitioner failed to state specific reasons why and how the outcome of his trial would have been different had he testified?

STATEMENT

An Abbeville County Grand Jury indicted Petitioner at the May 2009 term General Sessions for criminal domestic violence of a high and aggravated nature (CDVHAN), first degree burglary, and malicious injury to real property. App. 382-387. His case was called to trial on November 9, 2009 before the Honorable Eugene Griffith, and a jury. Assistant Solicitor Patricia Bolen represented the state, and Alexis Bell and Charles Grose represented Petitioner. App. 1. Petitioner was found guilty of all charges. App. 218, l. 21 – 219, l. 5. He was sentenced by Judge Griffith to twenty years imprisonment for first degree burglary, ten years concurrent for CDVHAN, and thirty days concurrent for malicious injury to real property. App. 241, ll. 4-22.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Greene, Op. No. 2012-UP-001 (S.C. Ct. App. Filed January 4, 2012); App. 245-247.

On March 7, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 248-254. The state filed a return to this application dated June 18, 2012. App. 255-261. The matter proceeded to an evidentiary hearing on March 11, 2013 before the Honorable Clifton B. Newman. App. 262. Assistant Attorney General J. Rutledge Johnson represented the state, and Thomas E. Hite, III represented Petitioner. Id. By order dated June 14, 2013, Judge Newman denied Petitioner relief. App. 373-381.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to adequately communicate a plea offer made by the state to Petitioner violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel.

PCR Hearing

In November 2009, Patricia Bolen worked for the Eight Circuit Solicitor's Office and was the solicitor who prosecuted Petitioner's case. She testified, "I know I offered straight up to the CDVHAN, with the burglary first and the malicious injury being dismissed . . . that was the offer for quite some time." App. 271, ll. 5-8. She explained that she later made a more "concrete offer of somewhere in the two-and-a-half to three-year range." App. 271, ll. 9-11. Bolen testified that her later offer "was consistent with what the judge said he would do on a straight up plea." App 271, ll. 22-24. She admitted that the second offer was made verbally to trial counsel and would not have been made in writing. App. 272, ll. 1-9.

Furthermore, Bolen testified that she never revoked the offer. She said, "[M]y personal policy was if - - if I made an offer, it was good. When it was made it was good any time. So I think - - **I don't think I ever officially revoked the straight up to the CDVHAN**." She also said **she did not "remember ever officially revoking a two-and-a-half or three-year offer**." However, she did admit that "at the time, [she] was working under Solicitor Jerry Peace and he generally had a policy that, you know, the day of trial offers were off the table." App. 273, l. 4 – 274, l. 12 (emphasis added).

Petitioner testified that he met with trial counsel six or seven times before trial. In regards to whether trial counsel communicated a plea offer to him, Petitioner testified that trial counsel did not give him anything in writing. He said, "[S]he did tell me something. But, it was like a maybe;

maybe I could get you in front of the judge and the - - the solicitor will go with this or go with that. So it wasn't nothing definite." App. 277, ll. 3-22. Petitioner testified that had he known a three year offer was on the table, he would have accepted the offer and pled guilty. He said, "I'd-a took the - - the offer; no - - no question about it." App. 277, l. 23 – 278, l. 10. Petitioner explained that after seeing all of the evidence, specifically pictures of the complainant's injuries taken the day of the incident, he would have accepted even a ten year offer. App. 282, l. 23 – 283, l. 14. Petitioner explained after seeing those pictures he felt his chance of going to trial and "winning the charge would be almost impossible." App. 278, l. 21 – 279, l. 9.

Trial counsel, Alexis Bell, testified that in November 2009 she worked for the Eight Circuit Public Defender Office and was court appointed to represent Petitioner. She said that a "safe estimate" of the number of times she met with Petitioner before trial was ten. App. 309, l. 24 – 311, l. 1. She claimed that the "first offer that was provided to him, and I informed him, was that everything except for the CDV charge would be dropped if he pled straight up to the CDV." App. 322, ll. 1-6.

She explained that in June or July 2009, she and the solicitor met with Judge Maddox in his chambers and showed him the evidence. Trial counsel said that after looking at the evidence, Judge Maddox said he "would probably sentence him to three years." She testified, "I let [Petitioner] know that and at the time he did not want to plead to that. He would have pled to CDV - - just regular CDV, but he wasn't wanting to plead to a CDVHAN or to anything that lengthy." App. 322, l. 7 – 323, l. 7.

Trial counsel said she and the solicitor spoke to another judge in September and "he said that he would do four years straight up." She claimed she "mentioned that to [Petitioner] and I said let me see if I can talk to the solicitor and if she's willing to, since we've had two judges give

similar offers over this past few months, maybe she's willing to make a concrete offer now." The solicitor allegedly told trial counsel that she would not negotiate a four year sentence, "but what [she] could do is let the judge decide how much time is hanging over his head, give him a two-and-a-half year sentence and then have probation follow." App. 325, l. 11 – 326, l. 9. Trial counsel claimed she conveyed this offer to Petitioner, but Petitioner refused to accept the offer because he did not want probation and he thought "two-and-a-half years [was] still too long." App. 326, ll. 10-24. She claimed Petitioner was only willing to plead guilty for an offer of eighteen months imprisonment. App. 327, ll. 1-4.

Trial counsel said that once the state received photographs of the complainant's injuries taken the morning of the incident, the solicitor withdrew the two-and-a-half year offer. App. 328, l. 24 – 329, l. 8. These new pictures were taken by the complainant's mother while the complainant was in the hospital. It allegedly took the mother a long time to develop the pictures and hand them over to the solicitor's office. App. 329, ll. 18-22. Trial counsel testified that when she showed Petitioner these new photographs, Petitioner wanted to plead guilty and asked if there were any offers still on the table. She said that she "was under the impression that [the solicitor] had to try the case now" and that all offers had been withdrawn. **Trial counsel acknowledged that Solicitor Bolen had just "said something different" and that "maybe [Solicitor Bolen] is right."** App. 330, ll. 4-17 (emphasis added).

Trial counsel later clarified that the three year sentence and four year sentence "weren't offers, they were just what the judge said. If he pled straight up to this, this is the sentence I would probably give him based on these facts." She claimed that it was Petitioner's decision to reject all offers. App. 338, l. 21 – 339, l. 15.

Order of Dismissal

The PCR court found that Petitioner's testimony about trial counsel's failure to relay plea offers from the solicitor was not credible. The court further found that Petitioner had been informed of the state's plea offers and had rejected them before trial. The court therefore held that trial counsel was not ineffective and that Petitioner suffered no prejudice. App. 379-380.

Discussion

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Our Supreme Court "has held that a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie, 381 S.C. at 607, 675 S.E.2d at 419 (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000)). The United States Supreme Court has also "made clear that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1406 (2012) (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (2010)) (internal quotations admitted).

"The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." Frye, ___ U.S. at ___, 132 S.Ct. at 1407. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions favorable to the accused." Id. at ___, 132 S.Ct. at 1408.

To prevail on his claim of ineffective assistance of counsel, Petitioner is required to prove that (1) trial counsel's failure to communicate the state's plea offer constituted deficient performance, and (2) he was prejudiced by this deficient performance, *i.e.*, there is a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Additionally, Petitioner must show actual prejudice. "However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice." Id. at 613, 675 S.E.2d at 422 (citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)).

In Davie, our Supreme Court found defense counsel's failure to convey the state's initial plea offer of fifteen years imprisonment to the defendant constituted deficient performance when the defendant later pled guilty and was sentenced to an aggregate amount of twenty-seven years imprisonment. 381 S.C. at 610, 675 S.E.2d at 421. This Court further found the defendant was prejudiced by defense counsel's deficient performance noting "that the difference in the sentence [the defendant] received and the plea offer is proof of prejudice." Finally, the Court held that a new sentencing hearing was the proper form of relief for the defendant. Id. at 614, 675 S.E.2d at 423. This Court noted that there was no evidence in the record that the defendant expressed a desire to proceed to trial rather than plead guilty and, therefore, a remand for a new trial was not the proper remedy. Id. at 615, 675 S.E.2d at 423-424.

In Frye, which was decided after Davie, the United States Supreme Court found defense counsel ineffective when he failed to advise the defendant of a plea offer or allow him to consider the offer before it expired. ___ U.S. at ___, 132 S.Ct. at 1408. The Court held, "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been

rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." Id. at ___, 132 S.Ct. at 1409. The Court ultimately remanded the case noting that the Court of Appeals of Missouri failed to require Frye to show that the "plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court." Id. at ___, 132 S.Ct. at 1411.

In Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 1383-1384 (2012), also decided after Davie, the United States Supreme Court found defense counsel ineffective when the defendant rejected a favorable plea offer, despite admitting guilt and expressing a willingness to accept the offer, after defense counsel "convinced [the defendant] that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist," which was "an incorrect legal rule."

In order to prove prejudice in these circumstances, the Court held "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at ___, 132 S.Ct. at 1385. The Court found the defendant in Lafler suffered prejudice because he had shown that but for counsel's deficient performance there was a reasonable probability he would have accepted the offer, the trial court would have accepted its

terms, and as a result of not accepting the plea and being convicted at trial, the defendant received a minimum sentence three and a half times greater than he would have received under the plea. Id. at ___, 1376 S.Ct. at 1391.

Furthermore, in Lafler, the Court rejected the Solicitor General's argument that "there can be no finding of Strickland prejudice arising from plea bargaining if the defendant is later convicted at a fair trial." The Court stated, "Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." Id. at ___, 132 S.Ct. at 1386.

Additionally, in Kolle v. State, 386 S.C. 578, 591-592, 690 S.E.2d 73, 80 (2010), this Court found plea counsel was ineffective in advising Kolle that the state's initial plea offer was "not a good deal" and misinforming Kolle that the offer would remain open after a suppression hearing, when the offer did not remain open and was significantly less than the seven year sentence Kolle received. (internal quotations omitted). This Court stated, "Had Kolle known that the state would withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence." Id. This Court thus affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

Here, Solicitor Bolen testified that she offered Petitioner a plea bargain in which she would dismiss the first degree burglary and malicious injury to real property charges if Petitioner would plead guilty "straight up" to CDVHAN.[1] She also testified that she later provided a more concrete offer of two-and-a-half to three years imprisonment if Petitioner pled guilty to

[1] CDVHAN carries a mandatory minimum of one year imprisonment and a maximum sentence of ten years imprisonment. However, the court may suspend all or part of the sentence except the one year mandatory minimum and place the offender on probation. S.C. Code § 16-25-65.

CDVHAN. Moreover, despite trial counsel's testimony that Bolen withdrew the offers after viewing photographs of the complainant's injuries, Bolen unequivocally testified that she never revoked these offers. She said, "[M]y personal policy was if - - if I made an offer, it was good. When it was made it was good any time. So I think - - **I don't think I ever officially revoked the straight up to the CDVHAN.**" She also said **she did not "remember ever officially revoking a two-and-a-half or three-year offer.**" App. 273, l. 4 – 274, l. 12 (emphasis added); See also App. 328, l. 24 – 329, l. 8.

Petitioner testified that trial counsel discussed possible sentences that she may be able to convince the solicitor to go along with and a judge to accept, but that trial counsel never informed him of any "definite" offers. See App. 277, ll. 3-22. Based on Petitioner and Solicitor Bolen's testimony, Petitioner has established that trial counsel was ineffective by not adequately conveying the state's plea offer to Petitioner before trial. Additionally, even if this Court finds trial counsel adequately conveyed the state's offer to Petitioner, this Court should find trial counsel ineffective based on her incorrect advice that the offer was withdrawn before the day of trial. See App. 329, ll. 5-8; see also App. 330, ll. 11-17.

Having established the first prong of the Strickland test, the remaining question is prejudice. Both Petitioner and trial counsel stated that Petitioner was willing to plead guilty before trial. Petitioner testified that had he known a three year offer was on the table, he would have accepted the offer and pled guilty. App. 277, l. 23 – 278, l. 10. Petitioner also testified that after seeing all of the evidence, specifically pictures of the complainant's injuries taken the day of the incident, he would have accepted even a ten year offer. App. 282, l. 23 – 283, l. 14.

Moreover, Petitioner was convicted of first degree burglary, CDVHAN, and malicious injury to real property and sentenced to twenty years imprisonment. However, under the plea offer,

Petitioner would have been required to plead guilty to only CDVHAN and would have received a maximum sentence of ten years imprisonment. The difference in the sentence Petitioner received and the plea offer alone is proof of prejudice. See Davie, 381 S.C. at 614, 675 S.E.2d at 423.

Furthermore, it is very likely that the two-and-a-half year to three-year sentence offered by Solicitor Bolen would have been accepted by the trial judge. Trial counsel testified that Judge Maddox told her that based on the facts he would sentence Petitioner to three years imprisonment. She also testified that another judge said he would sentence Petitioner to four years imprisonment. Because the two-and-a-half year to three year offer was close to the three year sentence and four year sentence given by the two judges, it is likely the recommendation by the solicitor would have been accepted by the trial court. Also, it is unlikely that the solicitor would have withdrawn the offer before it was accepted by Petitioner because Bolen testified that once she made an offer "it was good any time." See App. 273, l. 13-17.

Lastly, it should be noted that the United States Supreme Court has held that "[t]he fact that [the defendant] is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." Lafler, ___ U.S. at ___, 132 S.Ct. at 1388. Thus, even though Petitioner admitted he was guilty of battering the complainant, this does not mean he was not entitled to the effective assistance of counsel or that he did not suffer prejudice from trial counsel's deficient performance. See App. 294, ll. 16-19; see also App. 298, ll. 10-14.

Remedy

"The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received

under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial." In this situation, a resentencing hearing would be the proper remedy. Lafler, ___ U.S. at ___, 132 S.Ct. at 1389.

However, "[i]n some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." Id.

Because Petitioner was convicted at trial of more offenses than he would have been convicted of and sentenced to under the plea bargain, specifically first degree burglary and malicious injury to real property, a new sentencing hearing is not a sufficient remedy. Petitioner respectfully requests this Court to reverse his convictions and sentence and remand the case to the Abbeville County Court of General Sessions, with the requirement that the prosecution reoffer the plea proposal and with the instruction that the trial court may not sentence Petitioner to more time than his current twenty-year sentence. Additionally, Petitioner requests this Court to further instruct the state and trial court to take into consideration the prior two-and-a-half year to three year plea offer proposed by Solicitor Bolen. See Davie, 381 S.C. at 616, 675 S.E.2d at 424.

2.

The PCR court erred in finding Petitioner knowingly and voluntarily waived his right to testify at trial and that Petitioner failed to state specific reasons why and how the outcome of his trial would have been different had he testified.

Relevant Facts

The complainant, Theresa Sullivan, testified at trial that she and Petitioner began dating in March 2008 and that in May 2008, Petitioner moved into her mobile home in Donalds. App. 73, ll. 6-19. She claimed that Petitioner lived at this residence until February 19, 2009, when Petitioner ended the relationship and moved out of the home. She explained that on that date she dropped Petitioner off at his sister's house in Clinton and, on the following day, she also dropped off his belongings. App. 74, ll. 1-24.

Sullivan claimed that during the early morning hours on February 22, 2009, Petitioner came to her residence and beat and kicked on her door. She testified, "He just kept beating and kicking the door." She testified that she did not let Petitioner inside the home and was so scared that she "tried sliding the [clothes] dryer in front of the door." She claimed "[she] got [the dryer] about an inch or two in front of the door," but that Petitioner eventually kicked the door in and pushed the dryer sideways. App. 76, ll. 1-21. Once inside, Sullivan alleged Petitioner beat her, specifically that he grabbed her hair, slapped her, punched her, and kicked her while she was on the ground. App. 76, l. 25 – 77, l. 7. Sullivan testified that she eventually got Petitioner to go outside, and once outside, Petitioner's brother, who had driven him to Sullivan's residence, drove Sullivan to her parents' house, which was about an eight of a mile down the road. App. 90, l. 10 – 91, l. 21.

Petitioner was arrested a short time later at Sullivan's house. Multiple officers testified that when they responded to Sullivan's home, the door was "not busted open," but rather was closed and

locked and they had to use a key to enter the house. App. 128, l. 19 – 129, l. 3; App. 122, ll. 10- 21; App. 151, ll. 13-22.

Petitioner's brother testified in his defense. The brother explained that he drove Petitioner to Sullivan's house that night. He testified that when they arrived at the residence, Petitioner knocked on the door about five times. The brother said that after Petitioner knocked, he heard a muffled voice from inside the mobile home and then Petitioner say, "You know who it is." After this, someone from the inside opened the door and let Petitioner in the house. The brother explained that after Petitioner entered the house, the brother smoked a cigarette and waited for Petitioner to get his clothes and other belongings from the car. Petitioner and Sullivan eventually came outside and the brother drove Sullivan to her parents' house. App. 166, l. 15 – 170, l. 15. The brother also testified that Petitioner stayed with him at his house approximately five or six times while Petitioner was dating Sullivan and that every time he did he brought his clothing. App. 170, l. 16 – 171, l. 7.

Petitioner's sister also testified that Petitioner often stayed with her when he and Sullivan got into arguments. She explained that Sullivan would drop off Petitioner and his belongings at her house and that he would stay with her until he and Sullivan worked things out. The sister said that this happened so many times that she could not even give an estimate as to the number. App. 161, l. 2 – 162, l. 4. She confirmed that Sullivan dropped off Petitioner and some of his belongings on February 19, 2009. App. 162, ll. 6-23.

PCR Hearing

Petitioner testified at PCR that Sullivan would often put the clothes dryer in front of the door because her son would unlock the door and walk out of the house. He explained that this scared Sullivan so she kept the dryer in front of the door as a precaution. Petitioner testified that the state "made it like" Sullivan "put the dryer in front of the door for me not to come in the house when in

actuality she opened the door . . ." App. 284, l. 15 – 285, l. 2; App. 289, l. 23 – 290, l. 3. Petitioner confirmed that Sullivan let him in the house that night. App. 297, ll. 9-12. He said, "There is no way she could-a say she didn't want me in the house when she opened the door." App. 298, ll. 2-4.

Petitioner explained that before trial, trial counsel told him that it would be his word against Sullivan's word. He testified, "But then once the trial started, and then . . . I guess how badly it was going, she was like I don't see the point of you testifying. But I think Mr. - - Mr. Grose had - - was the one that - - that verbally told me, hey, I don't think you should testify because they're gonna bring up your past discretions . . ." [2] App. 292, ll. 2-13; see also App. 300, ll. 11-21. Petitioner said that despite this advice, he wanted to testify. He explained, "I seen like how it was going and [Sullivan] saying, hey, I did this and did that. I wanted to at least get my say so about it." Petitioner testified, "I felt like it would change the outcome because they - - my brother was actually there and seen her open the door. So, two people against one, they got to believe or something - - or something got-a give." App. 292, ll. 14-24. Petitioner again denied that he was guilty of burglary and explained that Sullivan let him into the home. App. 305, ll. 13-24.

Trial counsel claimed that she discussed with Petitioner his right to testify. She testified, "After the close of the state's case . . . we - - as is required, we discussed with him the pros and cons of taking the stand, um, on his own behalf . . . we discussed why we personally didn't think it was the best choice, but that was up to him and if he wanted to get up (sic) the stand, um, that we were more than willing to present him as a witness." App. 350, ll. 6-15. When further prodded by the court, trial counsel explained that she and Mr. Grose talked with Petitioner "prior to starting our line of witnesses . . . and informed him, you know, you are by rights allowed to test - - take your - -

[2] There is no ruling, or even a discussion, on the record regarding which of Petitioner's convictions, if any, could have been used by the state to impeach Petitioner if he had chosen to testify in his defense.

stand on your own to testify . . . we presented reasons why we didn't think that was the best idea, but left it up to him to make the choice. And he decided not to testify." App. 352, l. 21 – 353, l. 4. However, trial counsel could not remember why they advised Petitioner not to testify and was unsure whether Petitioner had any prior record that the state could use to impeach Petitioner with if he did testify. She eventually recalled that Petitioner was on probation for an "ABHAN charge," but said "I don't think there was anything else on his record other than that prior ABHAN." App. 354, l. 15 – 355, l. 7.

Trial counsel testified that if Petitioner had testified, "the only stuff that would have been added onto the record would have been his version of - - that he - - I think he mentioned earlier about that dryer getting put in front of the, uh, door regularly to keep her child inside the house. Um - - and his talk - - testimony that he lived there still. You know, he would have had his version of him still living there versus her word." App. 355, ll. 8-19.

Order of Dismissal

The PCR court found trial counsel "made [Petitioner] fully aware of his right to testify or remain silent after the close of the state's case." The court further found that Petitioner knowingly and voluntarily waived his right to testify at trial and that Petitioner failed to state specific reasons why and how the trial would have been different had Petitioner testified. The court therefore held that Petitioner failed to meet his burden of proof. App. 378.

Discussion

"The right of a criminally accused to testify or not to testify is a fundamental right." State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. at 241, 741 S.E.2d at 702 (quoting Rock, 483 U.S. at 53) (internal quotations omitted). "It is one

of the rights that are essential to due process of law in a fair adversary process." Rivera, 402 S.C. at 242, 741 S.E.2d at 703 (quoting Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)) (internal quotations omitted).

"A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). A waiver of the constitutional right to testify must be knowing and voluntary. See State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Trial counsel was ineffective by failing to advise Petitioner of his right to testify and ensuring that he knowingly and voluntarily waived this fundamental right. 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, 466 U.S. at 686; 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).

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 ineffective because, while she testified that she discussed with Petitioner why he should not testify, she failed to advise him of his absolute right to testify. Based on her testimony, it appears trial counsel was attempting to convince Petitioner not to testify, but did not ensure that his decision not to testify was made knowingly and voluntarily. Additionally, **there was no on-the-record waiver of his constitutional right to testify**. See Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) ("An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right.") Based on all the evidence, it was never established that Petitioner knowingly and voluntarily waived his right to testify.

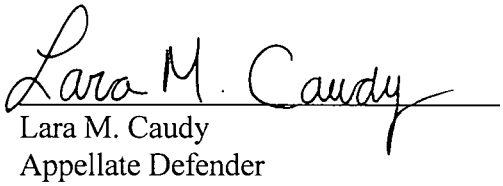
Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to properly advise Petitioner of his constitutional right to testify likely led Petitioner to make a decision without sufficient knowledge or understanding of this fundamental right. Therefore, Petitioner did not knowingly and voluntarily waive his right to testify. Ultimately, this prevented the jury from hearing Petitioner's testimony. If Petitioner would have testified at trial, his testimony likely would have created reasonable doubt in the minds of the jurors. Petitioner's testimony would have contested Sullivan's testimony that Petitioner did not live at the residence and that he forced his way into the house that night. His testimony would have also presented a plausible reason for why the dryer was placed in front of the door contradicting Sullivan's testimony that she placed the dryer in front of the door to keep Petitioner out of the house.

Therefore, this Court should find trial counsel ineffective for failing to ensure Petitioner knowingly and voluntarily waived his right to testify and that Petitioner suffered prejudice as a result.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented with the ultimate relief being a reversal of Petitioner's convictions and sentence and a remand to the Abbeville County Court of General Sessions for further proceedings.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County
Clifton Newman, Circuit Court Judge

ANTJUAN TOBIAS GREENE,

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of March, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.