STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County
Brooks P. Goldsmith, Circuit Court Judge

MICHAEL CHAD LAMBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-000584

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to object to the admission of Petitioner's statement to law enforcement when the statement was not voluntary because the officer took the statement on the very night of the vehicular accident while Petitioner was in the emergency room suffering from serious injuries and under the influence of pain medications?

STATEMENT

Indictments

On October 27, 2008, Petitioner Michael Chad Lambert was indicted by the Chesterfield County Grand Jury for one count of felony DUI in violation of S.C. CODE ANN. § 56-5-2945(A)(2). App. 587-588. Petitioner was subsequently indicted on January 11, 2010 for reckless homicide in violation of § 56-5-2010 and involuntary manslaughter in violation of § 16-3-60. App. 590-591; 593-594.

Trial and Guilty Verdict

Petitioner was tried before the Honorable Paul M. Burch and a jury on February 8-11, 2010. App. 1. Petitioner was represented by James C. Cox, Jr., and the State was represented by Assistant Solicitors Kernard E. Redmond and Adam M. Foard. Id.

The jury found Petitioner guilty on all charges. App. 484, ll. 6-17. Judge Burch sentenced Petitioner to twenty-two years for felony DUI, ten years for reckless homicide, and five years for involuntary manslaughter. The sentences were to run concurrently. App. 495, l. 24 – 497, l. 13. Petitioner did not file a direct appeal.

PCR Application and Evidentiary Hearing

Petitioner filed an application for post-conviction relief ("PCR") on February 4, 2011. App. 500-506. The State filed its Return on August 11, 2010. App. 507-511.

An evidentiary hearing was held before the Honorable Brooks P. Goldsmith on January 11, 2013. App. 512-577. Petitioner was represented by Andrew F. McLeod, and the State was represented by Assistant Attorney General Tyson A. Johnson, Sr. App. 512. Both Petitioner and his trial counsel testified at the hearing. App. 517-571.

Order of Dismissal

Judge Goldsmith issued his Order of Dismissal on February 13, 2013, denying and dismissing Petitioner's PCR application with prejudice. App. 579-584. This petition for writ of certiorari follows.

STATEMENT OF FACTS

Relevant facts of trial

This case arises out of a vehicular collision which resulted in the death of Darryl Quick. The State contended that on July 23, 2008, Petitioner, while under the influence of alcohol, crossed the center line of US Highway 1, North of McBee, South Carolina and collided head-on with the Cadillac driven by Quick resulting in the death of Quick. App. 588.

Prior to trial, Petitioner moved the Trial Court to transfer the case from Chesterfield County due to the "heavy county-wide pre-trial publicity" from the date of the accident. Supp. App. 10-11. In his motion, Petitioner asserted that Deputy Darryl Quick was "a well-known member of the entire Chesterfield Community, a long-time law enforcement officer, and held in such high esteem by the entire community . . . ." Supp. App. 10. In support of his motion, Petitioner referenced the Solicitor's comments to the media: "This case, the loss of this officer, drives home the point that we cannot have any tolerance of people who get on the highway and drive under the influence, especially twice the legal limit. I don't know what it will take for people to learn that officers, law enforcement, and prosecutors just will not put up with this anymore." Supp. App. 10-11.

As a result of the pre-trial publicity and the deceased's status as a highly regarded law enforcement officer in the community, Petitioner argued that his right to a trial by a fair, competent, and impartial jury was compromised. Supp. App. 11.

On October 6, 2009, a pre-trial hearing was held on the motion to change venue before Judge Burch. Supp. App. 1-8. The Trial Court ruled that under State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997), it needed to attempt to seat a jury before it could decide

whether or not it was possible to obtain an impartial jury despite the extensive pre-trial publicity. Supp. App. 7, l. 18 – 8, l. 12.

The trial began four months later on February 8, 2010 and voir dire of the jury was conducted by the Trial Court. App. 11, l. 2 – 40, l. 25. Multiple jurors indicated that they knew Darryl Quick or his wife Michelle Quick, either through the school where Michelle Quick taught, the school where Darryl Quick served as a resource officer, or through law enforcement ties. App. 32, l. 10 – 33, l. 20; 37, ll. 15-19. One potential juror indicated that he had "discussed [the case] several times in the last year and a half with different people." App. 33, ll. 18-20.

At least eleven jurors had either read about the case in the newspaper or viewed coverage of the case on television. App. 33, l. 21 – 36, 21. Several jurors indicated discussing the case with others, and at least one potential juror indicated discussing the case with local law enforcement officers. App. 33, ll. 18-20; 35, ll. 3-22.

The jury was selected, and Petitioner's trial counsel did not renew his motion to change venue based upon the deceased's status and substantial pre-trial publicity. App. 41, l. 8 – 48, l. 3. After the jury had been selected, another juror had to be excused for failing to disclose that she worked in the same school as the wife of the deceased. App. 56, l. 7 – 60, l. 7.

At trial, there was no dispute that the accident caused the death of Darryl Quick. App. 103, l. 10 – 104, l.2. The parties hotly contested why the accident happened and whether Quick or Petitioner was at fault for the accident.

The accident happened on July 23, 2008 around 6:30 p.m. in the evening on Highway One north of McBee. App. 105, ll. 23-25; 106, ll. 6-8; 129, ll. 14-17; 242, ll. 23-25.

Reginald Parker, an emergency room physician who happened to come upon the scene of the accident shortly after it happened, testified that the roadway was "slightly wet," "but there was no standing water." Parker said there was a light fog that evening, with about thirty to fifty feet visibility. App. 104, ll. 19-23; 105, l. 23 – 107, l. 7; 109, ll. 7-12.

Craig Walker, the Deputy Coroner for Chesterfield County, responded to the scene of the wreck on Highway One that evening. App. 118, l. 1 – 119, l. 4. Upon his arrival to the scene, he "noticed two vehicles. One partially blocking the roadway. Light rain. Didn't notice any water or anything on the road, any hazards." App. 119, ll. 5-10. He testified that Petitioner had been driving the red pickup truck at the scene, while Quick had been driving the white Cadillac. App. 128, ll. 7-13.

On cross-examination, Deputy Coroner Walker admitted that his report indicated that "there had been heavy rain before the accident." App. 132, ll. 2-4. He acknowledged that weather could be a contributing factor to the cause of the accident. App. 132, ll. 5-7.

Highway Patrol Trooper Leslie Davis was called out to the scene of the accident. He testified that by the time he arrived at the scene, the rain had stopped. He described the heavy rains that had been happening before the accident: "It was a heavy downpour from the time I headed to the scene. It had been raining shortly early that day." App. 134, l. 17 – 135, l.1; 137, ll. 12-15.

After Trooper Davis left the scene of the accident, he went to Carolina Pines Hospital in Hartsville to speak with Petitioner. App. 141, ll. 16 – 22. Trooper Davis met

with Petitioner in the emergency room and read him his Miranda[1] rights. App. 141, l. 22-142, l. 6. Trooper Davis videotaped the interview, and Petitioner admitted that he drank beer before the accident. App. 142, ll. 9-10. Trooper Davis said Petitioner told him he was traveling from Alabama to his mother's house in Patrick, South Carolina and that he thought he must have fallen asleep before the accident. App. 142, l. 11 – 143, l. 22. Petitioner's trial counsel did not make any objection to this admission of this statement and did not even request a Jackson v. Denno[2] hearing to determine whether the statement was voluntary.

When this statement was taken, Petitioner had just woken up in the hospital emergency room. App. 390, ll. 9-20. His injuries were severe, and he ended up staying in the hospital for a week. App. 390, ll. 21-22. He had lacerations to his left ear and the back of his head. He had a fractured disk in his back and a fractured rib on the left side. He also had a collapsed lung, a broken femur in two places, and a crushed ankle. App. 390, l. 25 – 391, l. 4. Petitioner had no recollection of giving Trooper Davis a statement while in the emergency room. App. 392, ll. 9-20.

Trooper Robert O'Donnell also investigated the accident. App. 240, ll. 2-17; 242, ll. 20-23. Trooper O'Donnell was a member of the Multi-Disciplinary Action Investigation Team ("M.A.I.T.") and was qualified by the Trial Court as an expert in accident reconstruction. App. 240, l. 25 – 242, l. 17. He responded to the scene around 9:00 p.m. on the evening of the accident. App. 242, l. 23 – 243, l. 5; 245, ll. 1-3. He noted that there was standing water on the roadway pre and post collision. App. 244, ll. 17-19.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] 378 U.S. 368 (1964).

Sergeant Steve Breland was also a member of the Highway Patrol's M.A.I.T. team and was also qualified in the area of accident reconstruction. App. 251, l. 21 – 256, l. 3. Based upon his investigation of Quick's vehicle, it was his opinion that Quick braked three seconds before the collision. App. 268, ll. 12-15.

Retired Corporal Timothy Perry was employed with the Highway Patrol on the date of the accident. He too was a member the M.A.I.T. team and qualified as an expert witness in accident reconstruction. App. 270, l. 10 – 274, l. 17. He also investigated this accident. On the day after the accident, he went to the scene to observe it and look around but he did not document anything that day. App. 275, ll. 7 – 23. On July 25, 2008, he examined the two vehicles involved in the wreck in an attempt to understand how the vehicles collided. App. 275, l. 23 – 276, l. 5.

Based upon Corporal Perry's investigation of the vehicles and the scene of the accident, he testified that at the moment of impact, both vehicles were left of the center of the road – in other words, both vehicles were not in their lawful lanes of travel. App. 324, ll. 8-11. Despite the fact that both vehicles were left of the center, Corporal Perry concluded that Petitioner was the driver at fault in the collision. He explained a phenomenon called "fake shift symptom." He said that drivers should always want to steer to the right – go off the road – before a collision, but that occasionally there are drivers that will nevertheless drive to the left. App. 324, ll. 12-22.

Corporal Perry believed that Quick, upon seeing Petitioner's vehicle cross the center line, must have also then driven left of the center line, perhaps to avoid a guardrail off to the right of the road. Corporal Perry also testified that after the collision, Petitioner's vehicle was found across the center line, but at an angle indicating that he was trying to head back

into his lane. Corporal Perry testified that unfortunately these two individuals must have tried to avoid the accident at the same time and somehow met each other. App. 324, l. 23 – 329, l. 9.

Based upon this conjectural theory, Corporal Perry concluded that Petitioner left his lane of travel, crossed the center line, and tried to head back into his lane at the time of impact. App. 331, ll. 22-25. He believed Quick, even though he had crossed the center line too, was "obviously attempting to avoid the situation or a collision" based on the "Fake Left Syndrome.[3]" App. 332, ll. 3-14.

Based upon his accident investigation, Corporal Perry stated:

> It was our opinion that [Petitioner] set the scenario up, and then obviously realizes that he's across the center line and attempts to go back to his natural lane. But at the same time the driver of the other vehicle attempted to change lanes to avoid the situation which actually both of them simultaneously had the same thought and both tried to go back and they actually meet.

App. 340, ll. 18-24.

On cross-examination, Corporal Perry admitted that the South Carolina Driver's Manual instructs drivers facing an oncoming vehicle to "sound [their] horn and pull as far to the right as possible." App. 343, l. 17 – 344, l. 11.

George Robert McElveen, a volunteer fireman, received an alert about the accident and headed to the accident scene around 7:20 p.m. He said that while traveling to the scene, "[i]t was raining real hard" and a bad thunderstorm was in the area at the time. App. 356, l. 1 – 359, l. 25. When he arrived at the wreck scene, he "saw two vehicles. One in the center of the roadway. One to the side of the roadway. A lot of water on the roadway.

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[3] Corporal Perry called this "fake shift syndrome" in his earlier testimony. App. 324, ll. 16-17.

Two occupants. One in each vehicle. Both were trapped." App. 360, ll. 16-19. McElveen also testified that it was still daylight when he arrived at the scene. App. 363, ll. 7 – 11. He reiterated that the roadway "was very flooded. It was very wet. It was flooded out." App. 363, ll. 23-24.

Howard Weatherford was also a volunteer fireman who responded to the accident. App. 367, l. 16 – 369, l. 16. He said that while driving to the wreck, the "rain was so hard you couldn't hardly see the road in front of you." App. 369, ll. 21-23. Weatherford further testified: "The day of the accident when I got there there was more water on the road than usually be on the road." App. 372, ll. 1-2. The roadway contained "standing water." App. 372, ll. 3-4.

In closing argument to the jury, trial counsel for Petitioner argued that the likely cause of the accident was that Quick's Cadillac – with an anti-lock brake system - likely hydroplaned on the heavily wet roadway that was full of standing water. App. 292, ll. 14-15; 325, ll. 3-4; 449, ll. 9-16.

The jury found Petitioner guilty of felony DUI, reckless homicide, and involuntary manslaughter. App. 484, ll. 6-17. Prior to sentencing, Chesterfield County Sheriff Sam Parker appeared before the court and urged the judge to send a message to the people of Chesterfield County. App. 490, l. 11 – 491, l. 3. No direct appeal was taken.

Relevant Facts of the PCR Evidentiary Hearing

Petitioner testified that did not believe he was able to receive a fair trial in Chesterfield County. App. 518, ll. 8-12. He said that while his trial counsel did make motion to change venue, that motion was not renewed after selection of the jury. App. 518, l. 19 – 519, l. 7.

Petitioner also testified about giving a statement to Trooper Leslie Davis at the hospital on the night of the accident. Petitioner said in the statement he admitted to drinking some beer, but testified that when he gave the statement he "was under the influence of narcotics for the pain" he was suffering. App. 528, l. 5 – 529, l. 12. Petitioner testified to the serious nature of his injuries as a result of the accident: "lacerations to the head – front and back of the head; cracked ribs, punctured lung, my ankle was crushed, and my femur was a compound fracture." App. 528, l. 25 – 529, l. 2. Petitioner said he gave his statement at the hospital while he was being treated for the serious injuries on the night of the accident. App. 529, ll. 6-12. Petitioner's statement was allowed to be used in court, and his trial counsel made no motion to suppress the statement or otherwise objected to the admission of the statement at trial. App. 528, l. 15-529, l. 18.

Within minutes of being sentenced, Petitioner said that his trial counsel asked him if he wanted to appeal, and Petitioner told him no. App. 519, ll. 15-24. Petitioner did not feel, however, that he was in the right mental state to be making decisions about his legal options immediately following the sentencing. App. 520, ll. 3 – 6.

Trial counsel admitted that he did not renew the motion to change venue following jury selection. App. 545, ll. 17-24. He testified that he would have greatly preferred to try the case in another county besides Chesterfield: "[A]s his defense attorney I would have liked to have tried him in some other county." App. 550, l. 21 – 551, l. 3; 559, ll. 5-6. Trial counsel believed that with the "death of a well thought of deputy sheriff who was also a minister, [Petitioner] could not get a fair trial in Chesterfield County." App. 559, ll. 15-18.

Trial counsel also admitted not moving to exclude Petitioner's statement to Trooper Leslie Davis. Ap. 555, l. 24 – 556, l. 3. Trial counsel said he would have filed an appeal for Petitioner if Petitioner had told him to do so. App. 557, ll. 9-12.

Order of Dismissal

The PCR court rejected the grounds Petitioner set forth for post-conviction relief. App. 579-584. The PCR court ruled that Petitioner was not prejudiced by his trial counsel's failure to object to Petitioner's statement to Trooper Leslie Davis because it was established at trial that Petitioner's blood alcohol level was .16. App. 581. The PCR court also ruled that Petitioner was not entitled to post-conviction relief for his trial counsel's failure to renew the motion to change venue following jury selection. The PCR court found that trial counsel testified he could not meet the legal standard for changing venue and that any defect was cured by proper voir dire. App. 582.

ARGUMENT

The PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to object to the admission of Petitioner's statement to law enforcement when the statement was not voluntary because the officer took the statement on the very night of the vehicular accident while Petitioner was in the emergency room suffering from serious injuries and under the influence of pain medications.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

Deficient Performance and Prejudice

The statement Petitioner made to Trooper Davis on the night of the accident while Petitioner was in the hospital suffering from serious injuries and on pain medication was not voluntary, and there was a reasonable probability that the trial judge would have found the State failed to prove the voluntariness of Petitioner's statement by a preponderance of the evidence had Petitioner's trial counsel objected to the admissibility of the statement. See Dupree v. State, 305 S.C. 285, 408, S.E.2d 215 (1991).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). The State bears the burden of showing the statement of the defendant was voluntary. Id. at 382, 652 S.E.2d at 450.

The test of voluntariness is "whether a defendant's will was overborne" by the circumstances surrounding the given statement. The due process test takes into consideration the totality of all surrounding circumstances-both the characteristics of the accused and the details of the interrogation. Id. at 384, 652 S.E.2d at 451 (citing Dickerson v. United States, 530 U.S. 428, 434 (2000)).

In Withrow v. Williams, 507 U.S. 680 (1993), the Supreme Court of the United States set forth a non-exclusive list of factors which may be considered in the totality-of-the-circumstances analysis:

> Under the due process approach . . . courts look to the totality of circumstances to determine whether a statement was voluntary. Those potential circumstances include not only the crucial element of police coercion, Colorado v. Connelly, 479 U.S. 157, 167 (1986); the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153–154 (1944); its location, see Reck v. Pate, 367 U.S. 433, 441 (1961); its continuity, Leyra v. Denno, 347 U.S. 556, 561 (1954); the defendant's maturity, Haley v. Ohio, 332 U.S. 596, 599–601 (1948) (opinion of Douglas, J.); education, Clewis v. Texas, 386 U.S. 707, 712 (1967); ***physical condition***, Greenwald v. Wisconsin, 390 U.S. 519, 520–521 (1968) (per curiam); and mental health, Fikes v. Alabama, 352 U.S. 191, 196 (1957).

507 U.S. at 693–94 (emphasis added).

Petitioner's statement to Trooper Davis was not voluntary viewing the totality of the circumstances. He had just been in a serious automobile accident and had suffered numerous injuries: "lacerations to the head – front and back of the head; cracked ribs, punctured lung, my ankle was crushed, and my femur was a compound fracture." App. 528, l. 25 – 529, l. 2.

He was in the emergency room and under the influence of narcotic medication due to his serious injuries. App. 529, ll. 7-9. Petitioner did not even recall making this statement to Trooper Davis. App. 392, ll. 9-20. The State did not prove by a preponderance of the evidence that Petitioner voluntarily waived his rights where Petitioner was in no state of mind to do so. See Mincey v. Arizona, 437 U.S. 385 (1978) (holding statements made by the defendant in a hospital while in great pain and while he was encumbered by tubes, needles, and breathing apparatus were involuntary and could not be used against him).

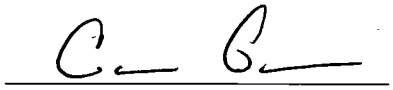
It cannot be said beyond a reasonable doubt that the admission of Petitioner's statement that he drank beer and fell asleep at the wheel did not contribute to the jury's verdict. In closing argument to the jury, the solicitor highlighted Petitioner's statement that he must have dozed off while driving after driving for nine hours while drinking beer. App. 457, ll. 1-17. Petitioner's statement was the only evidence that he might have fallen asleep at the wheel, and he denied falling asleep when he testified at trial. App. 404, l. 21- 405, l. 3. Petitioner also denied his ability to drive a vehicle was impaired after drinking four beers from Alabama to McBee – one beer when he stopped in Madison, Georgia, two more beers when he stopped at the rest area at the Georgia/South Carolina border, and one beer when he stopped in Camden around 5:30 p.m. to get gas. App. 385, l. 23 – 399, l. 13; 403, l. 24 – 404, l. 20; 407, ll. 20-22; 408, ll. 2-9.

Petitioner's statement would have been suppressed by the Trial Court had trial counsel properly objected to the statement and moved to suppressed the statement, and there is a reasonable probability the result of the trial would have been different had Petitioner's statement been suppressed. See Dupree, 305 S.C. at 287-88, 408 S.E.2d at 217. Therefore, Petitioner is entitled to a new trial.

CONCLUSION

For the foregoing reasons, Petitioner Michael Chad Lambert respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chesterfield County
Brooks P. Goldsmith, Circuit Court Judge

MICHAEL CHAD LAMBERT,

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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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Michael Chad Lambert, #339270, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of March, 2014.

C. G.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of March, 2014.

Notary Public for South Carolina (L.S.)
My Commission Expires: July 3, 2023.