

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Florence County

S.C. Supreme Court

Benjamin H. Culbertson, Circuit Court Judge

TRACY WILLARD DANIELS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002572

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was trial counsel ineffective for failing to cross-examine the key State's witness with a transcript of that witness' statement given on the night of the killing, since that transcript would have contradicted the State's theory of the case?

STATEMENT

In August of 2000, the Florence County Grand Jury indicted Daniels for murder, indictment #2000-GS-21-977. On April 30, 2001, Daniels proceeded to jury trial before the Honorable Paul M. Burch. John DeBerry represented Daniels at trial. Thomas Russo and Jack Lawson prosecuted the case. The jury found Daniels guilty of the lesser included charge of voluntary manslaughter. Judge Burch sentenced Daniels to twenty six (26) years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Daniels, Op. No. 2004-UP-394 (S.C.Ct.App. filed June 22, 2004). The South Carolina Supreme Court denied the petition for writ of certiorari and the remittitur issued on December 16, 2005.

On September 19, 2006, Daniels filed an application for post conviction relief. The State filed a return on May 15, 2007. On December 18, 2008, an evidentiary hearing was held before the Honorable Benjamin H. Culbertson. Harry Devoe represented Daniels at the PCR hearing. Julie Thames was present on behalf of the State. In a written order signed February 6, 2009, Judge Culbertson denied relief and dismissed the application. A timely notice of intent to appeal was filed and on November 23, 2009, a petition for writ of certiorari was filed on Daniels' behalf. In an order dated February 7, 2011, the South Carolina Supreme Court vacated the order of dismissal and remanded the case in order to allow Daniels to introduce a taped statement Mary McDougal, a key State's witness, made to police. (App. pp. 914-915). One of the allegations raised at the PCR hearing and on appeal was counsel's failure to cross examine McDougal when her trial testimony differed from her statement.

On March 2, 2012, a second hearing was held before the Honorable Benjamin H. Culbertson. Harry Devoe again represented Daniels. David Spencer was present on behalf of the

State. In an amended order of dismissal following remand signed November 1, 2013, Judge Culbertson again denied relief and dismissed the application. A timely notice of intent to appeal was served on December 4, 2013. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective for failing to cross-examine the key State's witness with a transcript of that witness' statement given on the night of the killing, since that transcript would have contradicted the State's theory of the case

Trial counsel was ineffective for failing to cross-examine Mary McDougal Arion about discrepancies in her testimony at trial, and the statement she gave to police on the night of the shooting. At trial McDougal Arion testified that Petitioner took a "step back" before he fired the fatal shot. (App. p. 488, lines 10-17). In her statement to police, however, McDougal Arion did not mention Petitioner's stepping back. Trial counsel was ineffective for failing to bring this inconsistency to the jury's attention. Trial counsel made no reference, during the cross-examination of McDougal Arion, to the statement that she gave to police. Petitioner was prejudiced by trial counsel's failure to cross examine and reference the statement because the solicitor used the testimony that Petitioner stepped back to effectively argue that Petitioner did not accidentally shoot the decedent. The PCR judge erred in refusing to grant relief when trial counsel was ineffective for failing to cross examine McDougal Arion with the statement she made to police and petitioner was prejudiced by counsel's deficient performance.

The jury found Petitioner guilty of voluntary manslaughter in the shooting death of Petitioner's friend. The trial judge charged the jury with the lesser included offense of involuntary manslaughter and the defense of accident. (App. p. 794, line 20 – p. 795, lines 1-6; App. pp. 795-798). At trial, the State presented their key witness, Mary McDougal Arion (at the time of these events, she was known as Mary McDougal), to testify to the events that she observed on the night Petitioner shot the victim. McDougal was Petitioner's neighbor. She testified she returned to her mobile home that Saturday evening at about a quarter of six. (App. p. 468, line 7 – 468, lines 1-23). McDougal said the decedent was usually at Petitioner's home on the weekends, as he was that night.

She heard an argument between the two of them. At trial, she testified that heard Petitioner tell the decedent to “get the fuck out of my yard.” (App. p. 472 – 476). While McDougal was opening her door, she heard “a gun go off.” (App. p. 477, lines 1-3). She went inside, and to her backdoor window where she saw Petitioner “standing in the doorway holding the gun with it pointed up in the air.” (App. p. 478, lines. 10-13).

McDougal described for the jury what she observed next. She said after the first shotgun blast, she saw the decedent standing in the yard. He was picking up the grill and putting a lid on it. (App. 479, lines 4-24). She then observed the decedent go up to the door of the mobile home, and then go back into the yard. McDougal recalled it looked like the decedent had a metal rod in his hand. (App. p. 481, line. 2 – 482, lines 1-22). McDougal then saw Petitioner “coming out the door with the gun open.” (App. p. 482, lines 23-25). Petitioner walked over to the decedent and handed him the gun. (App. p. 483, lines 13-15).

McDougal said it appeared Petitioner had been trying to take a shell out of the gun when he gave it to the decedent. (App. p. 484, lines 19-24). She said she did not see any aggressive movements while the men exchanged the shotgun. She recalled “I observed the victim taking the shell out. And when he finished, he dropped something on the ground. And I see [saw] him pick it up and that’s [the shell] small enough to put it in his hand.” The gun was still open at this time. (App. p. 485, lines. 13-23). A shell *was found* in the decedent’s hand by the police. (App. p. 168, lines. 8–12).

After the decedent apparently picked the shell up off of the ground, McDougal said the decedent closed the gun. The decedent then opened the shotgun again, and gave it back to Petitioner. (App. p. 487, lines 2-25). McDougal testified at trial that Petitioner “closed it and **stepped back** and pointed it at him ... then a second later he fired it.” (emphasis added) She said

she ducked down from her window and she heard shotgun pellets hitting the side of her trailer. (App. p. 488, lines 10-25). She then called 911. (App. 489, lines. 3-9).

Petitioner offered testimony from family members that he had a drinking problem. This problem affected his memory, and his ability to remember what happened when he was drinking. These family members maintained Petitioner did not have any reason to harm the decedent, who was his friend. (App. pp. 537 – 544; p. 552, lines 10-13; p. 558, lines 15-22). Petitioner testified in his own defense. The decedent was his friend, and he said he had no reason to, or intention of, harming him. (App. p. 673, lines 7-23).

Petitioner testified about the events of that fatal day. He remembered he went with the decedent to a junkyard about one or two o'clock that Saturday afternoon to find a part for the decedent's car — apparently an inside door knob. (App. p. 674, lines 1-23). He said when they returned to his mobile home, they played the guitar. Petitioner also cooked steaks on the grill for the men to eat. (App. p. 676, line. 9 – 677, lines 1- 19). Petitioner admitted he had too much to drink that day. (App. p. 677, lines 24-25). He testified that in retrospect it was very foolish and reckless for him to get the shotgun out when the men had been drinking, or they were intoxicated. (App. p. 680, lines. 3-24). He testified that bringing the gun out after drinking so much was the biggest mistake of his life. (App. p. 680, lines 3-6). Petitioner testified that he initially brought the gun out because the decedent had asked about deer hunting later that night. (App. p. 680, lines 9-17).

Petitioner testified that when the steaks were finished, the decedent grabbed a steak knife and lunged at his throat with it. Petitioner was able to disarm the decedent, apparently with ease, and he went outside. (App. p. 681, lines.10-15; p. 688, lines 4-11; p. 716, lines 3-25). Petitioner said he came back inside, and they started arguing. “And I think we just started back drinking

again. And then before long wound up out in the yard with the gun. He had gone to his car as I remembered and just opened the trunk of his car and shut it.” (App. 688, line 4 – 689, lines 1- 9).

Petitioner thought the decedent was going to leave. “But he started coming back to the house and I carried the gun out and it was open. And I handed it to him . . . I knew there was a — It wouldn’t eject out of the chamber. And he said, Well let me hold it I can get it out . . . And after several tries, he got it to eject and it fell to the ground. And I didn’t know he had another shell. He put the shell back in it. And then handed it to me and said see if that will eject. And I moved to one side to try to eject it and he pulled the gun. He snatched it.” (App. p. 687, line 21 – 688, 689, 690 lines 1- 21).

Petitioner said the men were not arguing at the time, and that he was not mad at the decedent. He said he would not have handed the shotgun to the decedent if he was still arguing with him or threatening him. (App. 692, lines 4-25). Petitioner related that he did not mean for the gun to go off when the decedent grabbed it, and that the shooting was an accident. (App. p. 723 – 728, p. 731, line 23 – p. 732, lines 1- 11). He also said that the shotgun shell that unfortunately killed the decedent was put into the shotgun by the decedent. (App. p. 731, lines. 6-19).

During the evidentiary hearing held on December 18, 2008, Petitioner questioned trial counsel about a tape of an interview given by McDougal on the night of the killing:

Q: Did you ever—I believe you were given a tape of an interview that Ms. McDougall gave the night of the tragedy; is that correct?

A: Yes.

Q: And you heard that tape?

A: Yes.

Q: And you gave it to your client and his family to listen to; correct?

A: I don't—I probably did.

Q: And in that tape when she was testifying she made no comment at all as far as I know on the fact that your client took a step back before the gun was fired. Do you recall that?

A: I don't. I don't recall that she made a comment in that tape or not. I believe I've read it in her written statement.

Q: And her testimony taken 18 months later she made that comment, a step back.

A: I don't deny that.

(App.p. 868, line 25- 869, lines 1- 17). Trial counsel then conceded that if she had not said that, then he should have used that fact at trial. He testified that it could have made a difference in the outcome of the case. (App. p. 905, lines. 18-24).

At the close of the evidentiary hearing Petitioner argued that trial counsel was ineffective for failing use the taped prior statement to cross examine Mary McDougal. (App. p. 899, lines 12 – 25). The State argued that the tape had not been offered in evidence. (App. p. 900, lines 2-4). PCR counsel offered to get the tape from his car. (App. p. 900, lines 5-6). The PCR judge refused to allow the tape in evidence stating that he did not believe that the information contained on the tape would have made a difference in the outcome of the case. (App. p. 900, lines 8-25).

In the first order of dismissal the PCR judge wrote:

This Court finds trial counsel was not ineffective with regard to the tape of McDougal. Trial counsel testified he was not sure if he heard the tape but that if there were a discrepancy, he wished he had known about it. This Court finds even if there was a discrepancy in McDougal's testimony about whether the Applicant took a step before the shot was fired, this would not have changed the result of the trial.

(App. pp. 910-911).

On remand the taped statement of Mary McDougal and a transcript of the taped statement were introduced in evidence as Applicant's Exhibits #1 and #2. (App. pp. 928-930). The transcript of the statement is included in the Appendix. (App. pp. 954-963). In the amended order of dismissal following remand the PCR judge wrote:

This Court finds trial counsel was not ineffective regarding McDougal's taped statement. Trial counsel testified he was not sure if he listened to the tape but that if there was a discrepancy, he wished he had known about it. This Court has reviewed the transcript of the taped recording and determined it is nearly identical to her trial testimony. The purported discrepancy, that MacDougal stated at trial she saw applicant take a step back and raise the gun, is merely more detail than the written statement, and is not a true discrepancy. Further, this Court believes that cross-examination on this point would not have altered the result of the trial. Accordingly, this court finds that Applicant did not meet his burden of proving counsel was ineffective in this regard.

(App. pp. 950-951). The PCR judge erred. There is a true discrepancy between the trial testimony and the taped testimony. At trial McDougal testified that Petitioner "closed it [the gun] and **stepped back** and pointed it at him ... then a second later he fired it." (emphasis added) (App. p. 488, lines 15-17). In her statement to police, however, McDougal stated, "It appeared to me that maybe things had calmed down and they were getting over it or something, and maybe, you know, it was gonna be okay. When he handed the gun back to Tracy, that's when Tracy said something, which I couldn't hear, he snapped it shut and then she - held it up and shot him." (App. p. 961). McDougal does not mention in her statement that Petitioner stepped back, a critical factor when Petitioner's defense involved involuntary manslaughter and the defense of accident.

The discrepancy should have been brought to the jury's attention allowing the jury to decide what weight the discrepancy should be given in deciding between voluntary manslaughter, involuntary manslaughter or not guilty by the defense of accident. Trial counsel was ineffective in failing cross examine Mary McDougal about her previous statement to police that did not indicate that Petitioner stepped back before shooting. The State capitalized on trial counsel's deficient

performance by emphasizing, in direct examination and closing argument, the testimony about Petitioner stepping back before shooting and the fact that trial counsel did not challenge the testimony.

When questioning McDougal the prosecutor asked:

Q: And now I want to ask you it's not a pleasant thing to ask you to relive, but it's important. When you saw the defendant snap the gun shut and step back—You said he stepped backwards; is that correct?

A: Yes.

(App. 494, lines.21-25).

During his closing argument, the prosecutor emphasized the testimony about Petitioner stepping back:

Let me tell you something. When a man takes a gun, a shotgun, and he snaps it shut and **he takes a step back** and he raised it to his shoulder and he puts his thumb on that hammer and he pulls that hammer back and he fires that trigger into the throat of another man, I'm tell you that is not malice (sic). And you won't have murder in South Carolina because that is nothing but malice. That is nothing but meanness. I can't tell you why he did it. But that's not the State's burden to do. I don't have to tell you why he did it.

(App. p. 777, lines. 24- p. 778, lines 1-8) (emphasis added). The prosecutor referenced the stepping back earlier in closing arguing:

He took a step back excuse me—Let me—She said he hand it to him. There was something said. He snapped the gun closed. He took a step back, raised it up. And she stood right down here and showed you exactly what he did. Raised it up just like this hesitated a moment and fired.

Now, that's what Mary saw, but the defense doesn't want you to believe that part of her testimony. Only the part where they were handing the gun back and forth. So they don't want you to believe that he raised that gun up, held it up, hesitated and fired. But that's what she saw and that's what she told you.

(App. p. 773, line 21- p. 774, lines 1- 7) (emphasis added).

The prosecutor capitalized on trial counsel's failure to challenge McDougal with her prior statement arguing that if the statement had been different, counsel would have questioned her about the differences:

I'm not doing that because he's a super lawyer and I have no criticisms ever for Mr. Deberry. He did everything he needed to do in this case. But he's a good enough lawyer 'til I can assure you if Mary McDougal would have testified from this witness stand contrary to the statement she gave the night this happened, he would have questioned her about it, but she didn't.

(App. p. 763, lines.15-21). Trial counsel should have questioned her because, contrary to the prosecutor's assertion, the statement differed from the testimony. The jury, however, did not know that the statement differed from the testimony because trial counsel never questioned her about the prior statement and the prosecutor told the jury that the statement and the testimony were the same.

The prosecutor told the jury:

Mary McDougal's statement on December the 4th 1999 at approximately eight o'clock p.m. was verbatim to the statement that she gave you from this witness stand earlier this week—yesterday.

(App. p. 764, lines 15-18).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under

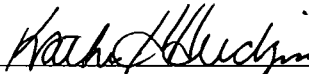
prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective for failing to cross-examine Mary McDougal about discrepancies in her testimony at trial, and the statement she gave to police on the night of the shooting. There is a reasonable probability that but for counsel’s failure to properly cross examine McDougal, the result of the proceeding would be different with a finding of guilt of involuntary manslaughter or not guilty based on the defense of accident.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Benjamin H. Culbertson, Circuit Court Judge

TRACY WILLARD DANIELS,

PETITIONER,

V.

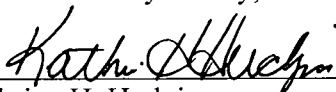
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002572

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 Joshua L. Thomas, Esquire this 14th day of July, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of July, 2014.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .