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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

J. Michael Baxley, Circuit Court Judge

DANIEL MCNEIL

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001709

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights when she voiced no objection to evidence which she knew to be inadmissible because she thought the client's wishes controlled her decision?

STATEMENT

On March 19, 2007, a Darlington County grand jury indicted petitioner for first degree burglary and assault and battery of a high and aggravated nature (“ABHAN”). App. 310 – 312. On January 22, 2008, petitioner was tried before the Honorable John M. Milling and a jury. App. 1. Patti McKenzie represented the State. App. 1. Tonya Copeland-Little represented petitioner. App. 1. The jury convicted petitioner on both charges. App. 223, ll. 4 – 13. Judge Milling sentenced petitioner to concurrent terms of fifteen years’ imprisonment for burglary and eight years’ imprisonment for ABHAN. App. 225, l. 21 – 226, l. 4. Petitioner’s convictions were affirmed on appeal in an unpublished opinion. App. 302.

On September 7, 2010, petitioner filed a PCR application. App. 228. On January 10, 2012, a hearing was held before the Honorable J. Michael Baxley. App. 240. Karen Ratigan represented the State. App. 243, l. 12. W.S. “Trey” Watts, III, represented petitioner. App. 240. On March 6, 2012, Judge Baxley denied petitioner’s application. App. 301. This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights when she voiced no objection to evidence which she knew to be inadmissible because she thought the client's wishes controlled her decision.

Relevant Facts

This case arises from a love triangle. Petitioner, referred to by the witnesses as "Bubba," dated Denise Ross ("Ross") for twelve years. App. 71, ll. 12 – 18. Petitioner considered Ross to be his wife. App. 144, ll. 6 – 7. Over the years, they "had problems," but always reconciled. App. 76, ll. 12 – 17. In August 2006, Ross and petitioner moved in with another man, James Johnson ("Johnson"). App. 67, l. 21 – 68, l. 1. App. 50, ll. 23 – 25. In September 2006, Ross testified that petitioner moved out of Johnson's house after the couple had a fight. App. 72, ll. 2 – 13. Once petitioner moved out, Ross became romantically involved with Johnson. App. 65, ll. 6 – 7.

Petitioner testified in his own defense. On the night of the incident, petitioner stopped by the apartment where Johnson and Ross lived to check on Ross. Ross's daughter told petitioner that she was concerned because she had not heard from Ross after a recent doctor's appointment. App. 149, l. 4 -151, l. 21. Petitioner asked Ross to step outside and talk with him. App. 152, ll. 1 – 7. Ross did not come outside and told petitioner it was because he had a knife and pointed out a knife on the ground by his foot. App. 152, l. 12 – 153, l. 10. Petitioner picked the knife up and was about to put it in his pocket when "the next thing I know I was faced down on the ground." App. 153, ll. 11 – 20. Petitioner then described a violent assault by Johnson that ended with petitioner in the hospital. App. 153, l. 11 – 157, l. 11.

Johnson and Ross told a story that differed significantly from petitioner's. Johnson claimed petitioner came to his door one evening and asked to speak to Ross. App. 53, ll. 9 – 17. Ross went

to the door and Johnson saw a knife fall. App. 53, ll. 9 – 17. Ross told petitioner she was not coming outside. App. 54, ll. 2 – 8. According to Johnson, petitioner then “knocked the screen out, reached his hand inside the door” and unlocked it. App. 54, ll. 2 – 8. Johnson and petitioner wrestled over the knife. App. 54, l. 9 – 55, l. 9. Johnson threw petitioner out of the house and told him to leave. When petitioner refused, Johnson hit him several times in the head with a brick. App. 54, l. 21 – 55, l. 9. Ross testified similar to Johnson, but stated she ran to a neighbor’s house during the tussle over the knife. App. 68, l. 5 – 70, l. 17. Johnson was listed as the victim in both indictments.

The Restraining Order

The month before the fight, Ross had obtained a restraining order against petitioner from a magistrate judge. App. 72, l. 18 – 73, l. 21. The solicitor was concerned about whether she could use the restraining order during the trial. App. 27, ll. 10 – 22. She asked the trial judge for “clarification” about whether she could use the restraining order in her opening statement. App. 27, ll. 10 – 22. Trial counsel told the court she had “[n]o objection” to the solicitor using the restraining order. App. 27, ll. 23 – 24. The solicitor then used the restraining order to devastating effect in her opening statement:

The Defendant Daniel McNeil, is no stranger to the victim in this case, James Johnson, or his girlfriend Denise Ross. Actually, Denise, use to date Daniel McNeil, and now resides and lives with Mr. Johnson. At the time the incident occurred, Daniel McNeil came to the house and broke into the house and **when this assault happened Denise Ross actually had a Restraining Order out on Daniel McNeil. He had no business there. He had no business making contact with Ms. Ross.** Ladies and gentlemen this is a case where an unwanted intruder went into a house, at night, armed with a knife, came at someone. He went there to do harm.

App. 37, l. 25 – 38, l. 11 (emphasis added).

Before the State called its first witness, the solicitor informed the court that trial counsel objected to any questioning about the basis of the restraining order. App. 43, ll. 7 – 16. Judge Milling immediately asked the solicitor, “How do you get around the 404?” App. 43, l. 17. Trial counsel then argued Rule 403 should exclude this evidence, calling it “highly prejudicial and confusing to the jury.” App. 43, ll. 3 – 12.

In response, the solicitor pointed out that the facts supporting the restraining order were contained in the order itself. App. 47, l. 3 – 23. The order stated that petitioner “stalked” Ross, threatened her, and struck her “causing injury.” App. 47, ll. 12 – 21. Judge Milling asked, “What else do you need? You can ask her to testify as to what is in the Restraining Order, **because the Restraining Order has already been allowed into evidence.**” App. 47, l. 24 – 48, l. 1 (emphasis added).

Interestingly, when Ross took the stand, the solicitor introduced the restraining order and said it had been marked “for identification purposes only.” App. 72, ll. 18 – 21. When she asked for it to be entered into evidence, trial counsel stated “No objection.” App. 73, ll. 8 – 11.

The PCR Allegations and Ruling

Petitioner alleged that trial counsel was ineffective in failing to object to the use of the restraining order. Trial counsel testified that even though she thought the restraining order was inadmissible, petitioner wanted her to talk about it. App. 286, ll. 22 – 25. She believed that the client’s decision on evidentiary issues controlled whether she could object to the restraining order. App. 286, ll. 22 – 25. The PCR court agreed. App. 305. App. 298, ll. 12 – 18.

Discussion

Both the PCR Judge and trial counsel made the same mistake: believing that the tactical decision regarding the restraining order belonged to the client. The law gives that decision—and

the duty to use professional judgment in making that decision—to the attorney. Abney v. State, ___ S.C. ___, ___ S.E.2d ___, No. 5207, Shearouse Adv. Sheet No. 11, 2014 WL 1047103, *3-4 (Ct. App. Mar. 19, 2014) (Pieper, J., concurring). “[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Id. “Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, **what evidence should be introduced, whether to object to the admission of evidence** [and] whether and how a witness should be cross-examined.” Id. (internal quotations and citations omitted) (emphasis added).

The PCR court found that petitioner, not his attorney, insisted on not objecting to the restraining order. App. 305. Judge Baxley ruled from the bench after the hearing. He stated that trial counsel “was concerned about the admission of the restraining order, but [petitioner] felt it was important to come into evidence.” App. 293, ll. 3 – 12. The PCR judge further found that trial counsel “was compliant with your instructions, and that her testimony is credible on that issue.” App. 293, ll. 3 – 12. PCR counsel argued that petitioner was “not the trained professional in this matter.” App. 295, ll. 21 – 24. Despite this argument, the PCR court persisted in its reasoning, stating that petitioner “intended to use that restraining order as a shield and as a sword against the victims in the case. And actually what happened was, as his lawyer tried to tell him, it got reversed and was used as a sword against him in the testimony.” App. 297, l. 21 – 298, l. 1. The PCR court specifically relied on trial counsel’s testimony to make this ruling, stating, “But I find [trial counsel’s] testimony, that [it] was all driven by the client’s decision to be credible.” App. 298, ll. 12 – 18.

Trial counsel erred in allowing the client’s judgment on an evidentiary and tactical matter to supersede her own. She stated that she “didn’t think that they would be able to get the restraining order in, because Ms. Ross was not the victim of the burglary.” App. 280, ll. 13 – 17. She

expressly stated that she thought the restraining order was inadmissible. App. 280, ll. 18 – 20. Despite her concerns, trial counsel acquiesced: “Again, I didn’t agree with everything Mr. McNeil wanted to do. But I tried to give him advice, **and ultimately the decision was his**, whether or not we would try to keep the restraining order out.” App. 286, ll. 22 – 25 (emphasis added). She also agreed that the dubious reasons petitioner wanted the restraining order mentioned—that petitioner and Ross still had a relationship and that he was invited to be at the scene the evening of the incident—could all have been shown without evidence of the restraining order. App. 287, ll. 1 – 18.

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 v. Washington, 466 U.S. 668, 686 (1984). Trial counsel’s failure to realize that the decision was hers and therefore not objecting to prejudicial evidence that she knew to be inadmissible constitutes ineffective assistance based on an error of law. Even though she knew letting the State use the restraining order was a bad idea, she erroneously thought that petitioner’s decision controlled her strategy. Without knowing the law regarding tactical decision making in a trial, no decision made by trial counsel can be characterized as reasonable.

Allowing evidence of the restraining order prejudiced petitioner. 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).

Trial counsel admitted that the restraining order was “mentioned throughout” the trial and its use by the State was “pervasive.” App. 283, l. 22 – 284, l. 3. Johnson said petitioner was welcome at the house up until “she put the restraining order out on him.” App. 62, ll. 16 – 23. Since petitioner testified, the trial was essentially a credibility contest between petitioner and the new lovers, Ross and Johnson. The fact that a judge had found Ross sufficiently credible to issue a restraining order against petitioner made Ross, an admitted crack addict, seem more credible. App. 80, l. 1 – 81, l. 12.

The State elicited from Ross that she went to “the Magistrate Court” to get the restraining order. App. 73, ll. 2 – 4. The solicitor asked, “Why did you go and get that restraining order?” App. 73, l. 5. Trial counsel did not object. Ross answered, “Because I was afraid of him threatening me again and abusing and coming and attacking me again.” App. 73, ll. 6 – 7. Trial counsel did not object. The solicitor stressed that Ross had gotten the restraining order in November 2006. App. 73, ll. 15 – 17. She asked whether Ross had any contact with petitioner “after the Judge issued that restraining order.” App. 73, ll. 18 – 21. During redirect, solicitor asked Ross why she ended her relationship with petitioner and Ross said, “Because of the abuse.” App. 78, ll. 3 – 8. Trial counsel did not object.

The State used the restraining order in its cross-examination of petitioner. The solicitor used it to undermine petitioner’s testimony that he was not “bothering” Ross at the apartment. App. 170, l. 8 – 171, l. 9. Immediately after referencing the restraining order, the solicitor argued in her closing that petitioner “knew he had no business going” to Johnson’s apartment. App. 193, l. 25 – 194, l. 1.

Finally, the solicitor directly argued to the jury that the restraining order meant that Ross was a more credible witness. The solicitor stated:

You heard from Denise. You heard about how she had went to a Judge here in Darlington and gotten a Restraining Order. So when defense counsel wants to attack her credibility, her character as a witness and say she's nothing but a crack addict, **well a Judge here in Darlington County found credible, and saw a real threat, and issued a Restraining Order for her** against the Defendant Daniel McNeil. He was not to come around her, and that was in November of 2006. The incident occurred the following month, approximately a month and a half after the Restraining Order was issued.

App. 193, ll. 14 – 24 (emphasis added). Trial counsel did not object to this argument. This bolstering of Ross's credibility likely made the difference in this case. Had trial counsel not been ineffective, had she been able to control her client and kept the restraining order out of evidence, the result of this trial would have been different. See State v. Kennedy, 272 S.C. 231, 233-34, 250 S.E.2d 338, 339 (1978) (describing the prejudicial effect of a jury discovering a judge's assessment of a witness's credibility).

In Holman v. State, the Supreme Court reversed and remanded for a new trial because of an attorney's failure to object to inadmissible evidence. 381 S.C. 491, 674 S.E.2d 171 (2009). Holman's attorney failed to object to the admission of a handgun seized from his residence that had no relation to the alleged crime. See id. at 492-93, 674 S.E.2d at 172. The Court stated, "We hold that the failure to object to this clearly inadmissible evidence was ineffective assistance of counsel. We reject the suggestion that the failure to object to the unrelated pistol can be justified as a valid trial strategy." Id. at 493, 674 S.E.2d at 172.

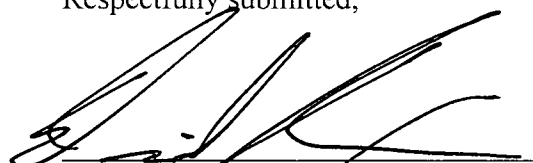
Just as in Holman, the failure to object to inadmissible evidence prejudiced petitioner. The trial judge recognized that evidence about the restraining order was inadmissible pursuant to Rule 404, SCRE. App. 43, l. 17. Trial counsel also untimely argued that Rule 403 barred this "highly prejudicial" evidence, which would have been correct but for her earlier acquiescence in its

admission. App. 43, ll. 3 – 12. Had the jury not heard evidence of the restraining order, Ross's testimony would have been less believable and the outcome of this case would have been different.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of a new trial for petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of March, 2014.

STATE OF SOUTH CAROLINA

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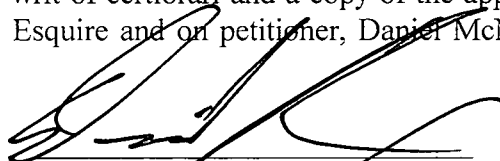
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001709

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 and on petitioner, Daniel McNeil, this 25th day of March, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of March, 2014.

Mark J. Jendryak (L.S.)
Notary Public for South Carolina

My Commission Expires: July 3, 2013