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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal From Greenville County
The Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 5267 (S.C. Ct. App. filed August 27, 2014)

Appellate Case No. 2010-173947

Steve R. Bagwell,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals on September 5, 2014 and denied by Order filed October 21, 2014.

QUESTIONS PRESENTED

1. Did the court of appeals err in finding trial counsel was ineffective for failing to request DNA testing on the pieces of glass at the crime scene?

2. Did the court of appeals err in finding Respondent was prejudiced as a result of trial counsel's performance?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent at the December 2003 term of General Sessions for first-degree burglary (2003-GS-23-9373). (App.pp.386-87). Dorothy A. Manigault, Esquire represented Respondent.

After the State called the case to trial,[1] Respondent was found guilty. On April 13, 2005, the Honorable C. Victor Pyle, Jr. sentenced Respondent to 20 years imprisonment. (App.p.249, lines 20-22).

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Respondent on appeal. (App.pp.251-60). The court of appeals affirmed Respondent's conviction and sentence. State v. Bagwell and Spain, Op. No. 2007-UP-377 (S.C. Ct. App. filed Sept. 18, 2007). (App.pp.274-80).

Respondent filed an application for post-conviction relief (PCR) on October 25, 2007 (2007-CP-23-7109). (App.pp.281-88). A hearing was held at the Greenville County Courthouse on May 27, 2010. (App.pp.295-361). Respondent was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Petitioner. The Honorable Robin B. Stilwell denied relief in an order filed August 12, 2010. (App.pp.363-74). Judge Stilwell denied Respondent's subsequent motion to alter or amend judgment by order filed September 2, 2010. (App.pp.375-84; p.385).

A notice of appeal was filed at this Court. Wanda H. Carter, Esquire of the South

[1] Respondent had both a joint trial and joint appeal with his co-defendant, Daryl Lee Spain.

Carolina Commission on Indigent Defense, Division of Appellate Defense represented Respondent on appeal. After a petition for writ of certiorari and return to petition for certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari by order filed July 8, 2013. After oral argument, the court of appeals reversed the PCR judge's denial of relief on August 27, 2014. Bagwell v. State, ___ S.C. ___, 763 S.E.2d 630 (Ct. App. 2014). Petitioner filed a timely Petition for Rehearing, which the court of appeals denied by order filed October 21, 2014.

ARGUMENT

I. The court of appeals erred in finding trial counsel was ineffective for failing to request DNA testing on the pieces of glass at the crime scene.

Certiorari is warranted in this case because the court of appeals erred when it found trial counsel was deficient in not requesting DNA testing on pieces of bloody glass found at the crime scene. The PCR judge was correct in finding trial counsel did not render deficient performance.

A.

At trial, Jarrett Armstrong and Chris Snoddy testified their apartment was burglarized. Armstrong testified he entered the front door of his apartment and saw Respondent "exiting through the broken glass." (App.pp.38-39; pp.70-71). Armstrong testified he left the apartment, ran into Respondent again, and punched him. (App.pp.43-44). Armstrong testified Respondent's face was bleeding before he punched him. (App.p.44). Snoddy testified that, before he could reach the rear of the apartment, Armstrong yelled that someone was running out the door. (App.pp.104-05). Snoddy testified that, once he reached the rear of the apartment, he saw the co-defendant "come out of the broken glass door"[2] and he hit him with a pole several times. (App.pp.80-83). Snoddy testified he then found Armstrong outside of Respondent's and co-defendant's apartment and saw Armstrong hit Respondent. (App.pp.83-84). Snoddy testified Respondent's face was bleeding before Armstrong hit him. (App.p.84). Respondent

[2] Co-defendant's counsel impeached Snoddy with his prior statement that he saw both Respondent and the co-defendant exiting the apartment. (App.p.93).

stated that, on the night in question, he was asleep in a recliner in his own apartment. (App.pp.176-78). Respondent stated he woke up when Armstrong was beating him and accusing him of breaking into his apartment. (App.p.178).

At the PCR hearing, Respondent argued a DNA test on the bloody pieces of glass found at the victims' home would have proven it was not his blood. (App.pp.307-09). Respondent argued he was bleeding when he was arrested because one of the victims beat him up, not because he cut himself on the broken glass at the victims' home. (App.p.333). Counsel for Respondent moved a DNA test into evidence that indicated blood on three pieces of glass did not belong to Respondent (and that a reliable DNA profile could not be developed from the other three pieces). (App.p.300; Supp.App.pp.32-35).

Trial counsel testified she was aware there were bloody pieces of glass but that no testing done on those items. (App.p.339). Trial counsel explained the first prosecutor on the case was considering having the items tested but the prosecutor who eventually had the case did not follow through with any testing. (App.p.351). Trial counsel testified she did not know whether DNA testing of the glass would have changed the outcome of the case. (App.pp.342-43). Trial counsel testified it would have simply been another piece of evidence for the jury to consider in determining credibility. (App.p.343). Trial counsel testified it is not the State's obligation under Brady[3] to run forensic tests on all pieces of available evidence. (App.p.358). Trial counsel also admitted the lack of Respondent's blood on the broken glass did not exonerate him of the crime. (App.p.358).

[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

In denying the application for post-conviction relief, the PCR judge found trial counsel was not ineffective in failing to have the evidence subjected to forensic testing. The PCR judge noted "trial counsel had to make a choice between continuing with the case (and having no DNA evidence to link [Respondent] to the charge) or postpone the case and potentially receive damaging evidence against her client." (App.pp.372-73).

B.

The court of appeals found Respondent met his burden of proving trial counsel's performance was deficient. The court found "trial counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel." Bagwell v. State, 763 S.E.2d at 634. The court found trial counsel's decision not to have the glass tested "was unreasonable because the State used the glass as circumstantial evidence of [Respondent]'s guilt." Id.

C.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The Strickland court noted:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance.

Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065.

D.

Trial counsel was not deficient for failing to have the broken pieces of bloody glass tested for Respondent's DNA. The court of appeals found trial counsel not performing this investigation "was unreasonable because the State used the glass as circumstantial evidence of [Respondent]'s guilt" and that "the test results could have supported [Respondent]'s claim that he was asleep in his apartment at the time of the burglary." Bagwell v. State, 763 S.E.2d at 634. There was no need, however, for trial counsel to have performed an independent investigation and obtained a DNA test on the glass. Evidence was presented at trial that Respondent's co-defendant had cuts on his feet when he was arrested. In addition, Respondent's defense at trial was that he was at home during the burglary. The lack of a DNA test did not hinder the defense and would not have rendered the State's theory of the case impossible. There was no need to have a DNA test performed that would not have affected the trial strategy. Rather, the case hinged upon a credibility determination by the jury – either they would believe the victims' story or the defense theory. A DNA analysis of the glass pieces that did not match Respondent would have simply been another factor for the jury to consider. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."). By its verdict, the jury clearly endorsed the victims' account of what transpired and discounted Respondent's testimony. See Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001).

Contrary to the court of appeals' opinion, the State did not use the bloody pieces of glass as circumstantial evidence of Respondent's guilt. While the prosecutor referenced the theory that Respondent cut himself on the broken patio door when he left the apartment,[4] this was merely argument and did not constitute evidence of any sort. See State v. Charping, 333 S.C. 124, 133 n. 7, 508 S.E.2d 851, 856 n. 7 (1998) ("A solicitor's closing argument is not evidence."); see also State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (finding a solicitor's argument must stay within the record and its reasonable inferences). Further, the court of appeals erred in finding trial counsel was deficient because of the prosecutor's reference during closing argument. Counsel cannot be held to have been deficient on this basis, as counsel cannot be expected to be clairvoyant about the inferences the prosecutor would make during closing argument. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 ("Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

Accordingly, the court of appeals erred in concluding Respondent met his burden of proving trial counsel was deficient because she did not request a DNA test on the bloody pieces of glass from the crime scene. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

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[4] App.p.227.

II. The court of appeals erred in finding Respondent was prejudiced as a result of trial counsel's performance.

Certiorari is warranted in this case because the court of appeals erred when it found Respondent was prejudiced because of both (1) trial counsel's statement at the PCR hearing that a DNA test "may have affected" the trial and (2) the assistant solicitor's comment in closing argument implying Respondent was cut after he ran through the broken glass door. The PCR judge was correct in finding Respondent failed to meet his burden of proving he was prejudiced by trial counsel not having an independent DNA test performed in this case.

In order to prove prejudice, a PCR applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). The PCR judge properly found Respondent could not "prove he was prejudiced by trial counsel's decision not to request a DNA test." (App.p.373).

A.

At the PCR hearing, trial counsel was asked on direct examination whether having the DNA results at trial would have affected the outcome of Respondent's case. Trial counsel replied:

> I don't know. It would be another point for the jury to consider. The testimony was that he was not there. His testimony was that he was beat up by these people in his own apartment sleeping. So it would be another

factor for – it may have affected it. I don't know.

(App.pp.342-43) (emphasis added).

The majority of the court of appeals panel held "prejudice may be found because trial counsel admitted the results of the DNA test 'may have affected' the outcome of [Respondent]'s trial." Bagwell v. State, 763 S.E.2d at 634. The concurring/dissenting opinion properly concluded Respondent failed to show the lack of a DNA test prejudiced his case. Id. at 637. The concurring/dissenting opinion concluded that – as the State presented evidence at trial that the co-defendant had lacerations, the bloody glass was not tested with the co-defendant's DNA, and the State's theory of the case was unaffected by the DNA test results– Respondent failed to demonstrate "that if his counsel had introduced the DNA results at trial, there is a reasonable probability the result of the trial would have been different." Id. (quotation omitted).

The court of appeals erred in concluding trial counsel's statement was sufficient to presume prejudice in this case. Trial counsel also testified, for example, that the lack of Respondent's blood on the glass did not exonerate him of the crime. Trial counsel's statement that a piece of non-exonerating evidence may have affected the trial in this case cannot be viewed as decisive. See, e.g., McAfee v. Thurmer, 589 F.3d 353, 356 (7th Cir. 2009) (noting attorney "reflection after the fact is irrelevant to the question of ineffective assistance of counsel"); Wright v. Hooper, 169 F.3d 695, 707 (11th Cir. 1999) (noting that ineffectiveness is an issue decided by the courts and that "admissions of deficient performance by attorneys are not decisive"). Allowing the determination of prejudice to rest upon trial counsel's admissions or beliefs takes the two-prong Strickland analysis

away from the courts and could allow for self-serving hindsight to determine whether counsel's performance was prejudicial. See Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) ("What decision [counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless, after more than a decade, for [counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television."). The concurring/dissenting opinion properly found Respondent failed to meet his burden of proving prejudice.

B.

During closing argument, the assistant solicitor made the following comment on the victims' testimony that they saw blood on Respondent's face that night:

> Now how did he get that? How did [Respondent] get that? How did he get this right here? How did he get this cut? One way he could have gotten this cut, ladies and gentlemen, one way is if when he ran out, ran through the glass in a hurry, see the arc on this glass? He could have cut his eye when he was running out.

(App.p.227).

The court of appeals found "the State's case against [Respondent] was not strong" and noted the State referenced the broken glass door "to corroborate Armstrong's testimony and infer [Respondent] was inside the victims' apartment." Bagwell v. State, 763 S.E.2d at 634. The court of appeals concluded "the jury more likely than not would have reached a different verdict had [the results of the DNA test] been presented at trial." Id. at 635.

The court of appeals erred in finding prejudice because, in part, the State referred to the broken glass door in closing argument. As noted supra, the assistant solicitor's closing argument was not evidence. See State v. Charping, 333 S.C. at 133 n. 7, 508 S.E.2d at 856 n. 7. Both Respondent and his co-defendant had scratches when they were arrested. As such, it was not improper for the assistant solicitor to have made an inference in closing argument that Respondent may have cut himself on the broken glass of the patio door – especially as there was other evidence of Respondent's guilt. See State v. Huggins, 325 S.C. at 107, 481 S.E.2d at 116. As there was no error in this comment, there can be no resulting prejudice.

The court of appeals erred in finding "the jury more likely than not would have reached a different verdict had [the results of the DNA test] been presented at trial." This finding is speculative and not supported by the record. One of the victims testified at trial that Respondent – and not his co-defendant – was inside the victims' apartment. Both victims testified Respondent was outside their apartment immediately after the burglary. There was stronger evidence against Respondent than his co-defendant, and yet the jury found both men to be guilty. To state the addition of this non-exculpatory, non-exonerating DNA evidence would have yielded a verdict of not guilty is rampant speculation and insufficient to support a finding of prejudice.

C.

As correctly noted in the concurring/dissenting opinion, Respondent failed to demonstrate he was prejudiced because no DNA test was performed in this case. Bagwell v. State, 763 S.E.2d at 637. The fact that the DNA test indicated Respondent's blood was

not upon the broken pieces of glass did not exonerate him from having committed the offense. Respondent failed to present any proof of where the broken glass was recovered (from the arc at the top of the broken glass door or from broken pieces on the ground). Not only does the negative DNA match not exonerate Respondent, it does not affect the State's version of events. Accordingly, the court of appeals erred in concluding Respondent met his burden of proving he was prejudiced by the lack of DNA testing on the broken pieces of glass. See Frasier v. State, 351 S.C. t 389, 570 S.E.2d at 174. The concurring/dissenting opinion properly found Respondent failed to meet his burden of proving prejudice.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By: 
ATTORNEYS FOR PETITIONER

November 18, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal From Greenville County
The Honorable Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2010-173947

Steve R. Bagwell,.....Respondent,

v.

State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari and Appendix II (as well as the Appendix and Supplemental Appendix) upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 18th day of November, 2014.

KAREN C. RATIGAN, S.C. Bar # 68331
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ATTORNEY FOR PETITIONER

ALAN WILSON
ATTORNEY GENERAL

November 18, 2014

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Steve R. Bagwell v. State of South Carolina
Appellate Case No: 2010-173947

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Petition for Writ of Certiorari. I have also enclosed two (2) copies each of the Appendix and Supplemental Appendix that were before the South Carolina Court of Appeals and the Appendix II that I am submitting with my Petition. Please let me know if you have any questions: 803-734-4042.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services Counselor