

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County
Robin B. Stilwell, Circuit Court Judge

S.C. Supreme Court

RUSSELL SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000639

JOHNSON PETITION FOR WRIT OF CERTIORARI

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In violation of Petitioner’s constitutional right to the effective assistance of counsel, trial counsel failed to obtain the medical records of the deceased and to use those medical records to cross-examine the deceased’s treating physician to demonstrate the deceased’s death was not the result of the gunshot wound, but was caused by the deceased’s poor health.5

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ISSUE PRESENTED

Did trial counsel's failure to obtain the medical records of the deceased and to use those medical records to cross-examine the deceased's treating physician to demonstrate the deceased's death was not the result of the gunshot wound, but was caused by the deceased's poor health violate Petitioner's constitutional right to the effective assistance of counsel?

STATEMENT

On January 19, 2007, a Spartanburg County grand jury indicted Petitioner for burglary in the first degree (2006 – GS – 42 – 3064). App. 578 – 579. On August 24, 2006, a Spartanburg County grand jury indicted Petitioner for four counts of pointing and presenting a firearm (2006-GS-42-3065; -3067; -3068; -3073), murder and possession of a firearm during the commission of a violent crime (2006 – GS – 42 – 3066), attempted armed robbery (2006 – GS – 42 – 3070), and assault and battery with intent to kill (2006 – GS – 42 – 3072). On January 22, 2007, a Spartanburg County grand jury indicted Petitioner for armed robbery (2006 – GS – 42 – 3071) and assault and battery with intent to kill (2007 – GS – 42 – 205). App. 578 – 579; App. 581 – 582; App. 584 – 585; App. 588 – 589; App. 591 – 592; App. 594 – 595; App. 597 – 598; App. 600 – 601; App. 603 – 604; App. 606 – 607. The state, represented by Harold W. Gowdy, III and Alex R. Stalvey, called the case for trial on January 22, 2007 before the Honorable J. Derham Cole and a jury. William H. McPherson and Clay Allen represented Petitioner. App. 1. The jury found Petitioner guilty of murder, possession of a firearm during the commission of a violent crime, burglary in the first degree, armed robbery, attempted armed robbery, and four counts of pointing and presenting a firearm. Additionally, on the two charges of assault and battery with intent to kill, the jury found Petitioner guilty of the lesser-included offense of assault of a high and aggravated nature. App. 420, line 14 – App. 421, line 13. Judge Cole sentenced Petitioner to five years' imprisonment for each of count of pointing and presenting a firearm; five years' imprisonment for each count of assault with intent to kill; five years' imprisonment for possession of a firearm during the commission of a violent crime; twenty years' imprisonment for attempted armed robbery; thirty years' imprisonment for armed robbery; and life imprisonment for burglary in the first degree and murder. App. 426,

line 8 – 428, line 10; App. 580; App. 583; App. 586 – 587; App. 590; App. 593; App. 596; App. 599; App. 602; App. 605; App. 608.

Petitioner filed a timely notice of appeal which was perfected by Joseph L. Savitz, III. App. 430 – 438. The Court of Appeals affirmed Petitioner’s convictions and sentences in an unpublished opinion. State v. Sims, Op. No. 2010-UP-080 (S.C. Ct. App. filed February 2, 2010); App 565 – 566. Thereafter, Petitioner filed a petition for writ of certiorari seeking review in this Court. App. 472 – 479. On May 25, 2011, this Court denied certiorari. App. 505. Remittitur was issued on May 27, 2011. App. 506.

On August 15, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 507 – 513. The matter proceeded to an evidentiary hearing on November 15, 2013 before the Honorable Robin B. Stilwell. Christopher D. Brough represented Petitioner, and Suzanne H. White represented the state. App. 520. By an order filed on March 6, 2014, Judge Stilwell denied Petitioner relief. App. 569 – 577.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In violation of Petitioner's constitutional right to the effective assistance of counsel, trial counsel failed to obtain the medical records of the deceased and to use those medical records to cross-examine the deceased's treating physician to demonstrate the deceased's death was not the result of the gunshot wound, but was caused by the deceased's poor health.

Relevant facts

Evidence presented during the trial

Petitioner was dating Diane Jackson, who lived with her father, Robert Jackson, and her two daughters in a home in Campobello, South Carolina. App. 104, lines 1-19; App. 105, lines 8- 15; App. 287, lines 21-25; App. 289, lines 2-5. Petitioner often spent the night with Diane and her family. App. 113, lines 7-25; App. 288, lines 13-24. On May 20, 2006, while Diane, her two children, her goddaughter's son, and Petitioner were driving home from Spartanburg, Petitioner pulled out his handgun and began shooting into the woods from the passenger side window. App. 106, lines 19-20; App. 121, lines 15-25; App. 160, lines 2-3; App. 169, lines 11-19; App. 170, lines 14-17; App. 295, lines 2-9; App. 296, lines 1-18.

When they arrived home, Petitioner entered the house to gather his things because he was returning to Spartanburg. App. 106, lines 24-25; App. 160, lines 8-18; App. 169, line 23 – App. 170, line 11; App. 296, lines 19-25; App. 297, lines 7-19. The parties disputed what happened after Petitioner walked outside. According to Petitioner, while he waited outside for Diane to drive him home, Robert walked onto the porch and began yelling at Petitioner. App. 107, lines 2-3; App. 107, lines 6-8. Robert then went to the side of the porch and retrieved a shotgun. When he pointed it at Petitioner, the two tussled. Petitioner then shot Robert. Diane gave Petitioner money and the keys

to her car, and Petitioner left.¹ App. 108, lines 5-14; App. 132, lines 12-18; App. 160, lines 5-23; App. 298, lines 10-18; App. 299, lines 5-23; App. 300, lines 2-11; App. 301, line 20 – App. 302line 11.

The police responded to the deceased's home and found Robert lying injured beside the couch. App. 96, line 23 – App. 97, line 4; App. 98, lines 7; App. 108, line 22 – App. 109, line 2. Robert was admitted to Spartanburg Regional Medical Center where Dr. Charles Morrow treated him. App. 235, lines 21-22. During the course of the testimony by Dr. Morrow, the state asked about his expert opinion on the cause of death:

Q. Do you have an opinion, Dr. Morrow, to a reasonable degree of medical certainty whether or not the gunshot wound suffered by Mr. Robert Jackson either caused or contributed to his ultimate death?

A. I think what, what happened is you have a guy who is in - - 75 years old, has some underlying medical problems but is functioning okay at home and is kind of teetering on being sick and being healthy and/but is getting around. And he got shot. And that was just enough of an injury to stress his body to put him over the edge. And we've all seen people who once they get a little bit of stress, we see that their organs just can't mount that response. And that's what happened in his case. And he had one organ after the next get in trouble. And so certainly the gunshot wound is the thing that started the ball rolling [sic] for him to eventually cause him to die.

Q. And he never left the hospital from the time he was admitted May 20th. He died at the hospital, correct, or restorative care?

¹ After leaving the home of the deceased, Petitioner stopped at the home of Diane's cousin not far away. App. 139, line 20 – App. 141, line 16; App. 306, lines 1-9. What occurred there was disputed at trial. According to Petitioner, when he approached the home, one cousin pointed a shotgun at him. App. 143, line 16 – App. 144, line 11; App. 180, line 12 – App. 181, line 2; App. 306, lines 10-14. Petitioner shot the cousin in the shoulder. App. 144, lines 10-11; App. 146, lines 10-17; App. 147, lines 19-23; App. 306, lines 15-18. Petitioner testified that when another cousin attempted to grab the shotgun dropped by the first cousin, Petitioner shot the second cousin as well. App. 177, lines 16-22; App. 178, lines 10-15; App. 181, lines 5-13; App. 307, line 19 – App. 308, line 6. Petitioner was charged and convicted of criminal offenses related to this incident as well. The issue raised in the PCR hearing and addressed in this petition do not concern the charges related to the offenses at the second home. Therefore, the facts surrounding those events are not recited here.

A. Right. He stayed in our intensive care unit and then went to our sister hospital, if you will, the hospital for restorative care, and ultimately died there.

App. 241, lines 4-25. Trial counsel asked Dr. Morrow no questions. App. 242, line 3.

The pathologist, Dr. John David Wren, also testified for the state. Dr. Wren performed the autopsy on the deceased on July 8, 2006. App. 258, lines 9-14. The gunshot wound to the neck had healed completely at the time of the autopsy. App. 258, lines 18-20. Dr. Wren opined death was caused by “a cascade of things that happened after he was shot ultimately leading to multisystem organ failure and probable sepsis as a result of the gunshot wound to the neck.” App. 259, lines 7-12. He further opined that the gunshot wound “definitely contributed” to his death. He admitted the deceased was not in “excellent health,” but he traced his death to “the sequence of events that happened after he was shot ... and what happened shortly thereafter, including the surgery he went under.” App. 259, lines 13-21.

Unlike the Dr. Morrow, Dr. Wren was cross-examined extensively by trial counsel. During the cross-examination, trial counsel reviewed each of the eleven items delineated in his final necropsy diagnosis. The autopsy revealed multiple organ systems failed resulting in the deceased’s death. App. 260, line 3 – App. 278, line 25. When asked if the failures of his multiple vital organ systems were the result of the gunshot wound or simply poor health, Dr. Wren answered, “I guess the best, quickest answer is to say it’s a combination.” App. 264, lines 16-22.

The evidence relating to cause of death was critical for the jury in making its determination. Due to the importance of the evidence and the ambiguity in the record, the jury requested to hear the cross-examination of Dr. Wren again during deliberations. App. 418, lines 6-18. Two hours after hearing the testimony, the jury returned with its guilty verdicts. App. 419, lines 11-12; App. 419, lines 23-24.

Evidence presented during the PCR hearing

Petitioner testified that trial counsel should have subpoenaed the medical records for the deceased and used those records during the trial. As Petitioner explained, there was a debate during the trial concerning the proximate cause of the deceased's death due to the death occurring over a month after the shooting incident and the deceased's poor health. App. 525, line 4 – App. 526, line 12. Petitioner recalled the deceased's treating physician, Dr. Charles Morrow, testifying for the prosecution. App. 526, lines 13 – 19. Petitioner further recalled that Dr. Morrow provided expert testimony regarding the deceased's cause of death. Particularly damaging to Petitioner's defense was Dr. Morrow's testimony that the gunshot wound "started the ball rolling for him to eventually caused him to die." App. 530, line 12 – App. 531, lines 12. However, trial counsel asked Dr. Morrow no questions. App. 529, lines 12 – 19; App. 531, lines 13 – 16.

Petitioner presented the PCR judge with the discharge summary prepared by Dr. Morrow regarding the deceased's discharge from the hospital to restorative care. App. 556 – 559. The medical record showed that the deceased was discharged on June 13, 2006, weeks before his death. The doctors concluded "that from the trauma stand point that the patient is stable to go to restorative care." App. 532, lines 2 – 16; App. 556 – 559. Petitioner made clear that his claim was that trial counsel failed to investigate and present evidence that the deceased was ultimately discharged from intensive care to the rehabilitation Center which would have created doubt concerning the proximate cause of the deceased's death. App. 543, lines 5 – 13.

Trial counsel did not recall his failure to cross-examine Dr. Morrow, and he could offer no reason for his failure to do so. App. 547, line 24 – App. 548, line 8. Trial counsel admitted that his strategy at trial was to show that the deceased died as a result of causes unrelated to the gunshot wound. App. 548, lines 9 – 19. More specifically, trial counsel testified that he wanted to create

doubt as to the proximate cause of death. App. 551, lines 7 – 11. However, trial counsel did not recall receiving the discharge document prepared by Dr. Morrow indicating the deceased was stable and being transferred to restorative care on June 13, 2006. App. 551, lines 17 – 21. Nevertheless, trial counsel admitted the discharge document would have been helpful in showing that the proximate cause of death was something other than the gunshot wound. App. 551, line 22 – App. 552, line 3.

Order denying relief

The PCR judge acknowledged trial counsel’s testimony that he failed to cross-examine the deceased’s treating physician, that did not recall receiving the documents regarding the victim’s discharge from the hospital to restorative care on June 13, 2006, and that he admitted the discharge documents may have been helpful to the defense challenging the proximate cause of death. App. 573. However, despite this credible evidence of deficient performance by trial counsel, the PCR judge found the allegation that trial counsel failed to conduct an adequate pretrial investigation or prepare for trial was without merit. App. 574. Additionally, the PCR judge concluded that Petitioner failed to establish any deficiency by trial counsel concerning “strategic decisions on who to cross-examine and what questions to ask.” App. 575. Further, the court found no prejudice that may have resulted from trial counsel’s inadequate preparation. App. 570.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a Petitioner must show that counsel’s performance was deficient and such deficiency prejudiced the Petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney’s performance is measured against prevailing professional

norms. Id. at 688. As this Court explained, “criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

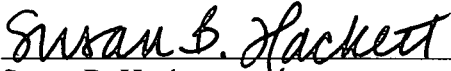
Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003)(holding counsel’s decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)(holding trial counsel’s investigation concerning Von Dohlen’s mental state was not reasonable despite the fact that counsel made “some effort” where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features”). In Walker v. State, 407 S.C. 400, 405-406, 756 S.E.2d 144, 146-147 (2014), this Court found trial counsel ineffective for failing to interview personally a potential alibi witness where the defendant claimed he was with the alibi witness and the alibi witness had corroborated the defendant’s claim in a taped interview. This Court highlighted the necessity of trial counsel making a reasonable investigation in order to make reasonable decisions. Id. at 405, 756 S.E.2d at 147; see also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

Trial counsel failed to subpoena the deceased's medical records prior to trial and use those records during the trial. The records demonstrated the deceased recovered fully from the gunshot wound and was transferred to restorative care due to his improved condition. The records further demonstrated that the deceased was in very poor physical health prior to and after the shooting. His death was the result of medical conditions existing before the shooting. Trial counsel's failure to obtain these records and used them during the trial was deficient performance. This failure prejudiced Petitioner because his defense was built upon self-defense and challenging the proximate cause of death. The discharge summary supported Petitioner's challenge to the state's argument that the deceased's death was a result of the gunshot wound. Rather, the discharge summary showed the deceased recovered from the gunshot wound, but died due medical conditions existing prior to the shooting incident. In light of trial counsel's credible testimony that he was not in possession of the discharge summary, he could not have made a strategic decision regarding whether and to what extent to cross-examine the state's witnesses concerning the summary.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court and grant
Petitioner relief from convictions and sentences.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

RUSSELL SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

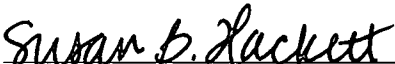
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Russell Sims states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was Appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on November 15, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Russell Sims.

Respectfully submitted,



Susan B. Hackett

Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of December, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Robin B. Stilwell, Circuit Court Judge

RUSSELL SIMS,

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V.

STATE OF SOUTH CAROLINA,

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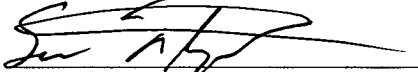
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the Appendix in this case have been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Russell Sims, #319755, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of December, 2014.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of December, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.