

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

Robin B. Stilwell, Circuit Court Judge

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

07-CP-23-07109

STEVE BAGWELL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2014-002465

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ISSUE PRESENTED

The Court of Appeals did not err in reversing the PCR judge's ruling that counsel was effective; but rather, the Court of Appeals correctly held that trial counsel **was** ineffective in failing to conduct DNA testing on blood found on glass pieces from the shattered glass door that the burglar used to exit the apartment since the state touted this blood evidence as the linchpin evidence linking the respondent to the burglary (via seven evidentiary references to this blood evidence at trial) because it was later discovered that the blood evidence did not match the respondent's blood.

STATEMENT OF THE CASE

The Respondent Steve Bagwell was found guilty of first degree burglary during the April 2005 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. App. 1-249. The respondent was represented at trial by Dorothy A. Manigault, and Assistant Solicitor Andrew appeared on behalf of the state. The respondent was sentenced to imprisonment for a period of twenty years in the case. App. 1 – 250.

Subsequently, the respondent appealed his conviction and sentence. On appeal, briefs were filed by the respondent and the state. App. 251-273. The respondent was represented by Joseph L. Savitz on appeal. Ultimately, the respondent's conviction and sentence were affirmed by the South Carolina Court of Appeals. See State v. Bagwell, Unpublished Opinion No. 2001-UP-377 (Ct. App. September 18, 2007). App. 274-280.

On October 25, 2007, the respondent filed a PCR application with the Greenville County Office of the Clerk of Court. App. 274-288. The petitioner filed a return dated January 16, 2008, requesting that a hearing be held in the case. App. 289-293.

A PCR hearing was held in the case on May 25, 2010, at the Greenville County Courthouse before Judge Robin Stilwell. App. 295-361. The respondent was represented by Susannah Ross at the PCR hearing and Assistant Attorney General Karen Ratigan appeared on behalf of the state. On August 9, 2010, Judge Stilwell issued an Order of Dismissal in the case. App. 363-374. On August 24, 2010, the respondent filed a Motion to Alter/Amend in response to the Order of Dismissal. App. 375-384. On September 1, 2010, Judge Stilwell denied the Motion to Alter/Amend. App. 385.

The respondent appealed Judge Stilwell's PCR Order of Dismissal and filed a petition for writ of certiorari on July 29, 2011. Supp. App. 1-16. The petitioner filed a return dated December

12, 2011. Supp. App. 17 – 29. On July 8, 2013, Court of Appeals granted the respondent’s petition for writ of certiorari and after oral arguments were heard, the Court of Appeals reversed the PCR judge’s Order of Dismissal in the PCR case. See Bagwell v. State, --- S.C. ---, 763 S.E.2d 630 (Ct. App. 2014). Sup. App. 65 - 75. The petitioner’s petition for rehearing in the case was denied on October 21, 2014. Supp. App. 76 – 83. On November 18, 2014, the petitioner filed a petition for writ of certiorari to this Court for review of the Court of Appeals’ decision in the case. The respondent’s return to the petitioner’s petition follows.

ARGUMENT

The Court of Appeals did not err in reversing the PCR judge’s ruling that counsel was effective; but rather, the Court of Appeals correctly held that trial counsel **was** ineffective in failing to conduct DNA testing on blood found on glass pieces recovered from the shattered glass door that the burglar used to exit the apartment since the state touted this blood evidence as the linchpin evidence linking the respondent to the burglary (via seven evidentiary references to this blood evidence at trial) because it was later discovered that the blood evidence did not match the respondent’s blood.

Swearing Contest Between Armstrong v. The Respondent At Trial

The respondent was charged, tried, and convicted of burglarizing Armstrong’s apartment. This case was a swearing contest between Jarret Armstrong, who stated that he saw the respondent inside his apartment on the morning the burglary occurred¹ and the respondent, who stated that he was

¹ Jarret Armstrong testified that after arriving at his apartment shortly after midnight on the morning of September 14, 2003, he realized that someone was inside his apartment. Armstrong explained that when he entered his apartment, he saw the respondent inside and that upon being noticed, the respondent escaped through the glass patio sliding door, which was shattered with

sleeping in his own apartment when the burglary occurred². The linchpin evidence, which can also be designated the tie-breaker evidence, was the blood evidence submitted in the case.

Use of Blood Evidence as the Linchpin/Tie-breaker Evidence

The blood from cuts found on the respondent's face at the time of his arrest and the blood found on the shattered glass pieces from the glass door the burglar exited constituted the linchpin/tie-breaker evidence used by the state to place the respondent at the crime scene and link him to the role of the burglar in the case. The state used the blood evidence in an attempt to sway the credibility test in favor of Armstrong's testimony.

State's Use of Blood Evidence (seven references at trial) as Linchpin/Tie-breaker Evidence

Armstrong stated that he saw the respondent inside his apartment, and that he (the respondent) exited through the sliding glass doors upon being seen. The state presented evidence indicating that the respondent was bleeding from cuts on his face that he gained from exiting through these glass doors. The state's theory was a logical inference presented to the effect that the respondent was the burglar who entered the apartment without consent. This inference was sealed

broken glass everywhere as a result. App. 33, l. 5 – p. 48, l. 7. Armstrong stated that he did not see Darryl Spain in his apartment on the morning in question. App. 53, ll. 18-20.

² The respondent testified that he was in his own apartment at 11:00 p.m. on September 13, 2003, and that he woke up shortly thereafter to find Armstrong in his apartment fighting him and accusing his roommate Darryl Spain of breaking into his apartment. The respondent stated that he called the police to report Armstrong's behavior immediately thereafter. App. 174, l. 7 – p. 188, l. 19. The respondent's position was that he did not commit the burglary as charged because he was in his own residence, not Armstrong's apartment, on the morning in question.

by the blood evidence, which was its linchpin/tie-breaker evidence. Note the following inferences (seven) wherein the solicitor used the unidentified blood found on the glass to prove that the respondent was the burglar:

- 1.) Armstrong testified that after the respondent ran out of his apartment through the glass patio sliding door, he (the respondent) was seen minutes later with a scar on his face and blood running down his face. App. 44, ll. 14-19; App. 70, ll. 13-19.
- 2.) State's exhibit #6 was a picture depicting the mark/scar Armstrong allegedly saw on the respondent's face on that night. The inference is that the mark emanated from the respondent having been cut by the glass door from which he escaped. App. 44, l. 15 – p. 45, l. 21.
- 3.) State's exhibit #5 was a picture depicting the broken glass door that the perpetrator ran through in order to escape. App. 56, ll. 6-19; App. 41, l. 17 – p. 42, l. 6; App. 184, lines 15 – 20.
- 4.) State's exhibit #7 was an actual picture of the broken glass from the shattered door in question. App. 184, ll. 21-23.
- 5.) During opening argument, the solicitor stated that Armstrong opened his door...and [saw the respondent] inside...and [that] the respondent became upset “and ran out the patio glass door,” which was the “patio glass door which had been shattered moments before” allegedly when the perpetrator entered Armstrong's apartment earlier. App. 25, ll. 3-6.
- 6.) Also, the solicitor stated at opening argument that the evidence will show that there was a cut and blood on the perpetrator's face. App. 26, ll. 1-8.

7.) Additionally, the solicitor argued at closing that Armstrong saw “a scratch on [the respondent’s] top eye and blood” and that there was “a little blood trail coming down the side of his face” and that “[petitioner] could have gotten this cut...if he ran out, ran through the glass in a hurry [as] ...he could have cut his eye when he was running out.” App. 227, ll. 1-11.

Clearly, the state attempted to present a connection (linchpin evidence/tie-breaker evidence) between the perpetrator’s alleged entrance and/or exit through Armstrong’s apartment sliding glass door, which was shattered in the process, and the cuts and the blood on petitioner’s face in order to place petitioner at the crime scene and link him to the role of burglar. Note that even the appellate court on direct appeal interpreted the state’s use of the blood evidence as linchpin evidence per its holding to the same effect in concurring that the blood evidence provided a connection between the blood present on the respondent’s face and the blood found on the shattered glass piece from the sliding glass back door of the apartment, and held on direct appeal:

[that this inference was supported further by Armstrong’s testimony that he saw petitioner] “leaving through the back glass patio door which had been shattered” and that the “physical evidence corroborated the testimony of Armstrong...[as] the back glass door of the victim’s apartment had been shattered,” as petitioner was seen “leaving the apartment.” App. 274 – 280.

PCR Hearing Evidence: Blood Evidence Did Not Match The Respondent’s Blood/DNA

The state did not conduct DNA testing on the blood evidence found on the shattered glass pieces recovered from the crime scene. During the PCR hearing, the respondent testified that trial counsel erred in failing to conduct DNA testing on him and the blood evidence found on shattered glass pieces present at the crime scene. The respondent stated that this omission prejudiced his

defense because the DNA testing conducted at the PCR stage yielded results indicating that the blood on the shattered glass pieces recovered at the crime scene did not match his (the respondent's) blood/DNA, which in turn meant that this would have provided the defense with exculpatory evidence that could have been used to attack the sufficiency of the state's case and supported the argument for the exoneration of him on the burglary charge. Petitioner added that he informed counsel that he was innocent and that he was bleeding at the crime scene because Armstrong assaulted petitioner on that morning. App. 307, l. 15 – p. 310, l. 19; App. 323, ll. 14-18; App. 325, ll. 2-4; App. 327, ll. 6-10; App. 333, ll. 2-6.

Trial counsel admitted at the PCR hearing that she failed to request that DNA testing be conducted on the blood found on the shattered glass pieces found at the crime scene before the trial. App. 339, ll. 4-10. Also, counsel admitted in effect that if the blood evidence had been DNA tested prior to trial and the results obtained proving there was no match to petitioner's blood and DNA prior to trial, then this would have been favorable and exculpatory evidence available to use in petitioner's defense at trial in order to argue that the state had insufficient proof beyond a reasonable doubt to support a burglary conviction against the respondent. App. 342, l. 18 – p. 343, l. 3; App. 349, l. 12 – p. 352, l. 7; App. 355, ll. 21-25.

PCR Judge's Ruling

The PCR judge ruled that the non-matching DNA blood test results would not have changed the result of the respondent's trial, and that therefore, the respondent did not satisfy the elements of the newly discovered evidence test that would require that a new trial be held in the case. App. 370-372.

Court of Appeals' Holding On PCR Appeal

On appeal of the PCR judge's ruling that counsel was not ineffective in failing to obtain DNA testing on the blood found on the shattered pieces of glass, the Court of Appeals reversed the PCR judge's ruling and referred in its opinion to the solicitor's closing argument where the solicitor explained that the respondent's cuts and blood on his face were in effect proof that "he [the respondent] ran out, ran through the glass in a hurry...[and that] ...he [the respondent] could have cut his eye when he was running out" as linchpin evidence, and went on to hold that this inference (and six additional inferences that the blood on the glass pieces belonged to the respondent) constituted the "linchpin evidence [used] to place [the respondent] at the crime scene." The Court of Appeals held that counsel was ineffective and unreasonable in failing to obtain DNA testing on the blood found on the glass pieces from the shattered glass door that Armstrong stated he saw the respondent exit (therein seeking to establish the respondents guilt as the burglar) because the blood did not match the respondent's blood, which in turn resulted in prejudice to the respondent's defense. The Court of Appeals elaborated as follows:

Additionally, we hold trial counsel's failure to test the blood samples prior to trial was prejudicial to [the respondent].... Initially, we note prejudice may be found because trial counsel admitted the results of the DNA test "may have affected" the outcome of [the respondent's] trial....Furthermore, the State's case against [the respondent] was not strong. As trial counsel explained, [the respondent's] trial was essentially a "swearing match" between the victims and defendants. The only direct evidence linking [the respondent] to the burglary was Armstrong's testimony that [the respondent] was exiting the apartment through the glass door... The State referenced the broken glass door several times at trial to corroborate Armstrong's testimony and infer [that the respondent] was inside the victim's apartment. During its opening argument, the State asserted that the evidence will show that after [Armstrong] entered [the respondent] became upset and ran out the patio glass

door... Additionally, the State admitted a photograph that show[ed] [the respondent's] face scarred with blood streaming down the left side of his face, and Armstrong and Snoddy testified [the respondent] appeared that way before Armstrong punched him. The State also introduced a picture of the broken glass door that the perpetrator ran through and a picture of the broken glass from the shattered patio door. Importantly, the State asserted to the jury in its closing argument. Although the DNA test results indicating [the respondent's] blood was not found on the pieces of glass do not exonerate [the respondent] or preclude the possibility of his guilt, we believe the jury more likely than not would have reached a different verdict had this evidence been presented at trial...The evidence would have rebutted the State's theory that [the respondent's] cut his eye while exiting the victim's apartment through the glass patio door. Furthermore, it would have cast doubt on Armstrong's and Snoddy's testimonies that [the respondent's] face was bleeding before Armstrong punched [the respondent]. Likewise, the evidence would have supported [the respondent's] testimony that he was in his apartment at the time of the burglary and his face was bleeding because Armstrong attacked him.

Considering the lack of evidence other than Armstrong's testimony, the repeated references to the glass by the State, and the importance of witness credibility at the trial, we find that but for trial counsel's failure to test the blood samples, there is reasonable probability the result of [the respondent's] trial would have been different. Supp. App 65 – 75.

Petitioner's Appeal of the Court of Appeals' Decision

The Court of Appeals opined that counsel was ineffective in failing to have DNA testing conducted on the linchpin blood evidence used by the state in the case. The petitioner argued that:

- a) The “respondent's defense that he was at home during the burglary” was not “hinder[ed]” by “the lack of a DNA test” because the case boiled down to a credibility determination as to whether the jury believed Armstrong or the respondent.

First, note that the blood DNA test conducted on the pieces of glass found at this scene did not match the respondent's blood DNA. Next, note that the petitioner's position ignores the obvious

importance of the DNA/blood evidence as linchpin evidence, which was particularly important in a swearing contest case where credibility is key to the case. The “no match blood/DNA” evidence would have presented the jury with the tie-breaker that tipped the scale in favor of the credibility of the respondent’s testimony.

In State v. Burgess, 371 S.C. 15, 703 S.E.2d 512 (2014), the Court cited to Crane v. Kentucky, 476 U.S. 683 (1986), in holding that a defendant has a right “to present a complete defense,” and that our South Carolina State Constitution (article 1 §14) mandates that “any person charged with an offense shall enjoy the right to be fully heard in his defense.” See also S.C. Code Ann. §17-23-60 (Supp. 2003). Additionally, corroborating evidence is defined as evidence supplementary to that already given, which would tend to strengthen or confirm it. State v. Nelson, 331, S.C.1, 501 S.E. 2d 716(1998); State v. Stroman, 281 S.C. 508 316 S.E. 2d 395 (1984). Since the state used the blood evidence to corroborate its position, then likewise the respondent should have been able to use the “no blood match” evidence to corroborate his case and present a complete defense. The respondent’s defense **was indeed** hindered by the lack of DNA blood testing and the “no blood match” evidence was more than just “simply another factor for the jury to consider” as argued by petitioner.

b. Petitioner argued that “the state did not use the bloody pieces of glass as circumstantial evidence of guilt.” To the contrary, the state used the blood evidence at least seven times as circumstantial evidence to prove that the respondent was the burglar. Again, the instances follow:

1.) Armstrong testified that after the respondent ran out of his apartment through the glass patio sliding door, he (the respondent) was seen minutes later with a scar on his face and blood running down his face. App. 44, ll. 14-19; App. 70, ll. 13-19.

2.) State's exhibit #6 was a picture depicting the mark/scar Armstrong allegedly saw on the respondent's face on that night. The inference is that the mark emanated from the respondent having been cut by the glass door from which he escaped. App. 44, l. 15 – p. 45, l. 21.

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4.) State's exhibit #7 was an actual picture of the broken glass from the shattered door in question. App. 184, ll. 21-23.

5.) During opening argument, the solicitor stated that Armstrong opened his door...and [saw petitioner] inside...and [that] the respondent became upset “and ran out the patio glass door,” which was the “patio glass door which had been shattered moments before” allegedly when the perpetrator entered Armstrong's apartment earlier. App. 25, ll. 3-6.

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The state used the blood evidence as circumstantial evidence and Armstrong's testimony as direct evidence to get the case to the jury. Any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused must be submitted to the jury. State v.

Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). See also, State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2014), where the court held that if the defense presents evidence, then the issue of the sufficiency of the evidence would encompass a review evidence presented by the state and defense.

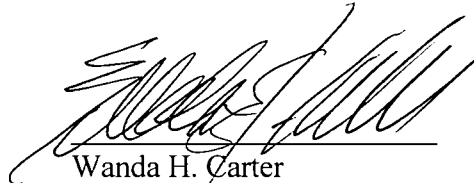
c. Petitioner argued that the respondent was not prejudiced as a result of trial counsel's ineffective legal assistance in the case; and that the "no blood match" evidence did not exonerate him of the crime, and that there was no prejudice as there was no support for the position that the verdict might have been reached, but for the error.

In order to establish ineffective assistance of counsel, the applicant must show that counsel's performance was deficient and that prejudice to the case resulted. Strickland v. Washington, 466 U.S. 668 (1984). Here, where credibility was key as a swearing match that existed between Armstrong and the respondent, and where the state used repeated references to blood/glass evidence as linchpin/tie-breaker evidence; clearly, counsel erred in not testing the blood evidence, which was found not to match the respondent's blood/DNA, as this "no match evidence" that would have corroborated the respondent's testimony that he was inside his apartment when the burglary occurred, and allowed him to present a complete defense, and added credibility to his testimony in light of the swearing match, and more importantly reduced the credibility of Armstrong and the state's case. Thus, but for counsel's error, a reasonable probability existed that the outcome of the trial, i.e., the jury verdict, would have been different.

CONCLUSION

Based on the foregoing argument, counsel would request that this Court deny the petitioner's petition and uphold the decision of the Court of Appeals on this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 7th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

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

07-CP-23-07109

STEVE BAGWELL,

RESPONDENT,

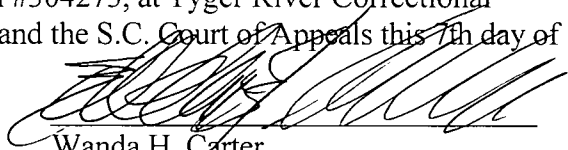
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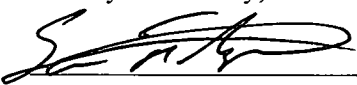
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Steve Bagwell #304273, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355 and the S.C. Court of Appeals this 7th day of January, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this
7th day of January, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022