

THE 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

RUSSELL W. RICE, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002602

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals was correct in holding trial counsel was not ineffective in failing to conduct an independent investigation of the alleged murder weapon found in the trunk of petitioner's vehicle?

STATEMENT OF THE CASE

Russell W. Rice was indicted by the Greenville County grand jury for trafficking cocaine, unlawful carrying of a pistol, and murder during its May 2003 term, and possession of a weapon during the commission of a crime during its December 2003 term. He was tried before the Honorable C. Victor Pyle, Jr. and a jury on April 15, 2004 and found guilty. He was sentenced to 25 years for trafficking cocaine, life for murder, one year for unlawful carrying of a pistol and five years for possession of a weapon during the commission of a violent crime. Rice was represented by Steven W. Sumner, Esquire.

Rice appealed his sentence and convictions, and the Court of Appeals affirmed on April 24, 2006. State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006). The South Carolina Supreme Court denied the petition for writ of certiorari order dated October 18, 2007.

Rice then filed an application for post-conviction relief on May 28, 2008. An evidentiary hearing was held on November 15, 2010 at the Greenville County Courthouse. Rice was represented by Rodney Richey, Esquire. A deposition in this matter was taken on December 12, 2010, and submitted to the court. An order of dismissal was filed on February 18, 2011.

Rice appealed and filed a petition for writ of certiorari on August 23, 2011. Respondent filed a return on October 28, 2011. On October 23, 2013, the Court of Appeals issued an order granting certiorari and directing the parties to submit briefs.

The brief of petitioner was filed on November 20, 2013. The brief of respondent was filed on November 27, 2013. Oral arguments were held on September 8, 2014. On October 15, 2014, the court issued an unpublished opinion affirming petitioner's conviction. Rice v. State, 2014-UP-361. A petition for rehearing was filed with the court on October 30, 2014. The petition was denied on November 21, 2014.

A petition for writ of certiorari was filed with this Court on December 9, 2014. On March 19, 2015, this Court granted the petition and directed the parties to serve and file the appendix and briefs.

This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in holding trial counsel was not ineffective in failing to conduct an independent investigation of the alleged murder weapon found in the trunk of petitioner's vehicle.

The question presented in this case was whether defense counsel was ineffective when he failed to conduct an independent investigation into the alleged murder weapon to find out if it was in fact the actual murder weapon since it was the only physical evidence connecting petitioner to the victim's murder?

On November 5, 2002, the victim was shot and killed outside a Super 8 motel in Greenville. An autopsy revealed a medium caliber projectile of high velocity that could have been fired from a hunting rifle. (App. p. 125, line 24). On November 11, a deputy coroner searched the area around the hotel where the victim was shot and he found two 30-06 cartridge cases. (App. p. 159, line 12 – p. 165, line 21). The police had developed petitioner as a suspect. On December 28, the police conducted a traffic stop on petitioner. A search of his trunk revealed cocaine and a dirty rifle that had been dismantled. Over \$2,500 was taken from petitioner's pocket. (App. p. 317, line 8 – p. 318, line 23; app. p. 319, lines 2 – 21).

James Armstrong, with the Greenville County Forensic Lab, was qualified as an expert in firearms identification. He identified the rifle found in petitioner's car. It was in seven pieces. The barrel was a Remington Arms 30-06 barrel. It had corrosion and dirt in it. The very end of the barrel was obliterated. The receiver was a Remington Woodsmaster receiver. The rifle could not be fired in its damaged condition. He said projectiles that were found at the scene were consistent with being shot through a rifle like the one he examined. (App. p. 379 – p. 405).

On cross-examination, he admitted that firing a bullet from the rifle was the best way of drawing a match to a bullet. The gun parts in this case, however, were heavily rusted and there was a lot of corrosion. He also said the Woodmaster Remington 30-06 was a very popular hunting gun in South Carolina. (App. p. 395, line 11 – p. 397, line 17).

PCR counsel retained a firearms expert who worked for the Georgia Investigation Crime Lab for 31 years. He had been qualified as an expert approximately 2,700 times. His opinion was that the test conducted in this case was unreliable. The type of test that was done on the evidence and the condition the evidence was in when it was tested could not yield a comparison that would come out with a positive answer. There was a dirt plug in the barrel and oxidation. If you remove the dirt plug, you have oxidation. If you remove the oxidation, it pits the barrel and leaves characteristics that were not there before oxidation. Because the chamber was cut off at the barrel the gun could not be fired. Of all the guns he has had where he could not fire them and had to push a bullet through the barrel, he was not able to match back to a bullet that was fired normally from that barrel. (App. p. 672, line 18 – p. 673, line 16).

When defense counsel was asked at the PCR hearing why he did not retain an expert to review the findings of the state's expert, he said, "I just didn't see it as anything that we really needed to do." That response is not a valid reason to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292 454 S.C.2d 312 (1995). Petitioner has shown that counsel failed to render reasonable effective assistance under prevailing professional norms. In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), this Court held that trial counsel had a duty to conduct an independent investigation into his client's case. Petitioner has also shown prejudice in that he has shown that there was a reasonable probability that but for counsel's efforts, the result of the proceeding would be different. A "reasonable probability" is simply a probability sufficient to undermine confidence

in the outcome of the trial. “When a defendant’s conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.’” Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 596, quoting Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052 (1984).

Had the retained expert testified at petitioner’s trial it is likely the result would have been different. The failure to call the expert undermined confidence in the outcome of the trial. The expert was extremely well qualified as opposed to the State’s firearms examiner who only had four years experience and the public safety department did not have a process for peer-reviewing the results of his tests.

In its opinion, the Court of Appeals cited Fraiser v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) which held that trial counsel’s failure to procure an expert witness was not unreasonable under prevailing professional norms where counsel vigorously cross-examined and attacked the accuracy of the evidence. That case, however, is 23 years old and does not reflect current law on the subject. In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), which was cited in the Brief of Petitioner, the South Carolina Supreme Court held that an attorney was ineffective in failing to conduct an independent investigation into his client’s case. In that case, defense counsel was ineffective in hiring a former SLED agent as an expert witness on gunshot residue because he was not an independent expert. The Court noted, “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. at 331-332, 642 S.E.2d at 597, quoting, Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986), *aff’d*, 828 F.2d 670 (11th Cir. 1987) (emphasis in original). The Court also quoted the American Bar Association Guidelines on “prevailing professional norms” with respect to forensics evidence as follows:

“With the assistance of appropriate experts, counsel should aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.”

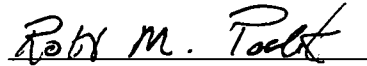
372 S.C. at 332, 642 S.E.2d at 597. (citations omitted). (emphasis added).

Recently, in Freiburger v. State, 2014WL543119, ___ S.E.2d ___ (2015) the Court held a defense attorney ineffective in failing to introduce a letter identifying a third party’s firearm as the murder weapon. The letter would have deeply undermined the foundation of the State’s case which was the ballistics evidence. In the above case, as in petitioner’s case, counsel did not articulate a valid reason to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

CONCLUSION

Petitioner should be granted a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of April, 2015

THE STATE OF SOUTH CAROLINA
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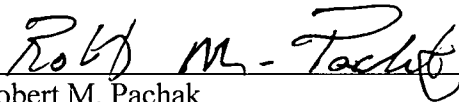
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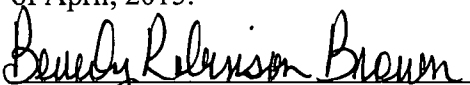
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner and the previously filed appendix, in this case has been served on Karen Ratigan, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 14th day of April, 2015 and Russell W. Rice, Jr., Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of April, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: December 9, 2024.