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May 26, 2015

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

MAY 29 2015

RE: LaChrisha S. Miller v. State of South Carolina
Case No.: 2011-CP-23-3652
Application for Post-Conviction Relief


S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed for filing a notice of cross-appeal in the above-referenced case, along with proof of service of the notice of cross-appeal on the respondent and a copy of the order, which is to be challenged on appeal. This is an appeal from an application for post-conviction relief. Accordingly, it is my understanding that no filing fee is due.

Should you have any questions please contact me at your earliest convenience.

Sincerely,



Kenneth Gibson

Enclosures

cc: Clerk of Court, Greenville County
Karen Ratigan, Office of the Attorney General

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 29 2015

APPEAL FROM COUNTY OF GREENVILLE
Court of Common Pleas

S.C. SUPREME COURT

The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-3652

LaChrisha Shentayle Miller,.....Respondent,

vs.

The State of South Carolina,Petitioner.

NOTICE OF CROSS-APPEAL

LaChrisha Shentayle Miller hereby files this cross-appeal of the order/judgment of The Honorable D. Garrison Hill filed April 16, 2015. Respondent received Petitioner's Notice of Appeal in this case on May 20, 2015.

May 26, 2015



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Attorney for Respondent

Karen Ratigan
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Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM COUNTY OF GREENVILLE
Court of Common Pleas

MAY 29 2015

The Honorable D. Garrison Hill, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2011-CP-23-3652

LaChrisha Shentayle Miller,.....Respondent,

vs.

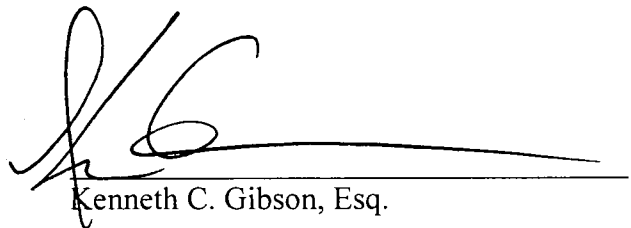
The State of South Carolina,Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve process and that on this day, he served copies of the attached **Notice of Appeal** upon The State of South Carolina by mailing a true and correct copy to:

Karen Ratigan
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211.

Date: May 26, 2015


Kenneth C. Gibson, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2303652

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 APR 16 AM 10:55

LaChrisha S Miller vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:
Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - D. Garrison Hill

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Kenneth Clifton Gibson The Law Office Of
Kenneth Gibson P.O. Box 5536 Greenville, SC
29606-5536

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211
CC: Judge Gary Hill

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

LaChrisha Shentayle Miller,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

THE COURT OF COMMON PLEAS
FOR THE 13TH JUDICIAL CIRCUIT

C.A. No.: 2011-CP-23-~~3652~~ 3652

FILED-CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. WILKINSON
MAY 16 10 10 13

ORDER GRANTING POST-
CONVICTION RELIEF

I. Introduction

On February 12, 2009, Applicant LaChrisha S. Miller was found guilty by a jury of one count of Attempting to Obtain Controlled Substance by Fraud. The Court of Appeals dismissed the appeal. State v. Miller, Op. No. 2011-UP-228 (S.C. Ct. App. filed May 18, 2011). Miller then petitioned for Post-Conviction Relief, alleging ineffective assistance of counsel. At the initial PCR hearing, Miller and her trial counsel, Mr. Brian Johnson, Esquire, testified. This court denied the PCR in a December 27, 2013 order. Miller moved to Reconsider, and on February 24, 2015, the court heard oral argument on the Motion. The Motion is granted.

II. Standard of Review for Ineffective Assistance of Counsel Claims

This Court reviewed the record and heard the testimony and arguments presented at the PCR hearing. This Court observed each witness who testified at the hearing, closely passed upon their credibility, and weighed the testimony accordingly. Set forth below are the findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002)

PH

(citing Rule 71.1(e), SCRPC). To prove ineffective assistance of counsel, the Applicant must show 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. Miller must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Miller must first prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117. Second, counsel's deficient performance must have prejudiced Miller such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. "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).

III. Miller's Specific Claims

To obtain PCR relief, Miller must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared or conducted an independent investigation. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to

the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). In her March 26, 2010 *pro se* brief, Miller contends her trial counsel did not effectively investigate and present evidence of third party guilt, did not effectively challenge the in-court identification, and did not present evidence regarding her alleged stolen license and identity.

IV. Law/Analysis

A. The Two Charges

i. The Walgreens Incident

Ms. Miller had two outstanding charges. One alleged that on April 27, 2007, a black female presented a prescription to the Walgreens Pharmacy for 120 Lortab pills for a patient named "Desmond Reeder." The prescription had been written by Dr. Bonabon. Dr. Bonabon later advised investigators that someone had altered the prescription by (1) adding the name "Reeder" below the original last name "German", (2) adding a prescription for Lortab (Dr. Bonabon had only prescribed Zyrtec to Mr. German), and (3) changing the patient's age from 5 years old to 25 years old.

According to Miller's PCR Application, the person who called in for the prescription to be filled identified herself as LaChrisha Miller and the person who picked up the forged prescription presented a driver's license bearing the name of LaChrisha Miller. The pharmacist later picked Ms. Miller out of a six-person photo array.

ii. The Walmart Incident

The second charge related to a later fraud perpetrated at a Walmart. On September 20, 2007 a female left a voicemail prescription request at the Walmart pharmacy on White Horse Road for Lortab written by Dr. Robert Thomas, DMD. The prescription request was handled by pharmacy technician Princess Mangle. The prescription was for a Kevin Smith. Mangle became

suspicious because the prescription called for 120 Lortab pills, an unusually high amount for a dentist to prescribe. Mangle called Dr. Thomas' office, which denied that the prescription was legitimate. Mangle alerted the pharmacist, who called Jeffrey L. Chilson, a drug inspector for DHEC Bureau Drug Control. Mangle testified she later observed a female arrive to pick up the prescription and present Miller's license as ID:

She was a black female. I can't remember what she actually had on at the time but before she actually came and picked it up because she had called to see if it was ready. It was actually the same voice that actually called in the prescription before the investigation... So when [the pharmacist] came down and he asked for her ID. And he let her know that he knew it was a forged prescription. So he kept the ID but the person actually refused to leave without getting the ID. After standing there for a little while then they finally left.

T. 36.

The name on the license was that of the Petitioner, LaChrisha Miller. Mangle testified that Miller was the person whose picture was on the license, and identified her in court as the person who came to retrieve the prescription.

Chilson did not do any photo array, lineup or other test to confirm Mangle's identification, because he felt the drivers' license and the voice ID gave him "sufficient probable cause." T. 49. He further stated he did not review or preserve the Walmart security cameras because "in my experience video, VHS tapes are not very definite on witnesses, on people."¹ T. 50.

In her defense, Miller called Marie Wearing, a custodian of driver's license records for SCDMV. Through Wearing, Miller put into evidence Defendant's Exhibit 6, Miller's driving record. As Wearing explained, the record showed that Miller surrendered her driver's license on May 31, 2006 by filling out a lost license affidavit. Miller was issued a new license on June 2, 2006. On cross examination by the assistant solicitor, however, Wearing admitted that because

¹ Walmart's security camera tape retention policy preserves images for 30 days. T. 80-81.

she did not bring the form that accompanied the affidavit, Miller's license could have been lost or suspended. The assistant solicitor then elicited from Wearing that Miller's license had in fact been suspended.

At the PCR hearing, trial counsel testified he discovered Tracy German had similar charges as the Applicant and had a boyfriend named Desmond Reeder. Trial counsel testified he investigated Desmond Reeder but could not locate him. He researched Tracy German's charges on the Public Index² and that, though she was in jail on her own charges, she did not confess to those charged to the Applicant. Trial counsel testified he brought this information to the assistant solicitor and Agent Chilson but that Chilson was adamant the Applicant committed these crimes because Ms. Mangle had positively identified her. Trial counsel testified he discussed this case with three other public defenders and determined he could not argue third party guilt because he did not have sufficient, concrete evidence. His trial strategy was to argue the Applicant had lost her driver's license, reported this to the Department of Motor Vehicles, and someone else used it to obtain the prescriptions. Trial counsel testified he also pointed out to the jury that Agent Chilson never obtained the surveillance videotape of the incident from Walmart. Trial counsel testified they knew there would be a jury question about witness credibility at trial, but he did not believe it was necessary to retain an expert witness on eyewitness identification.

The threshold issue is whether trial counsel was ineffective for failing to elicit third party guilt evidence of Tracy German. Trial counsel's theory was that someone stole Miller's license. Trial counsel proved at trial her license had been surrendered. PCR counsel contends trial counsel should have gone further, and brought out that the third party who stole the license was

² Tracy German's numerous arrest warrants for obtaining prescription drugs by fraud were entered at the PCR hearing.

Tracy German. The basis for this claim was that trial counsel had been told of Ms. German, had interviewed her, and knew of her 30+ pending warrants for similar prescription drug frauds. Moreover, there were signs that Ms. German and her boyfriend were involved in the similar prescription drug scheme at Walgreens which also involved the use of Miller's license. PCR counsel contends that trial counsel should have elicited evidence about the Walgreens episode as third party guilt because:

1. The Walgreens prescription was originally written by the doctor for patient "Desmond German" for Zyrtec. The prescription was then altered to add "Lortab." The prescription label read "Desmone Reeder." It appears the patient's age on the prescription had been changed from 5 years old to 25 years old.
2. Both the prescribing doctor and the pharmacist said the lady who obtained the prescription had 4 children with her.
3. Trial counsel knew that Ms. German had a boyfriend named "Desmond Reeder," and PCR counsel says she had a son named "Desmone German," and that LaChrisha Miller only had 2 children at the time.
4. Both incidents involved the quantity of 120 Lortab.

Third party guilt is a classic defense, and because of its ability to sow doubt as well as needless confusion, its admissibility is limited by a rather elastic standard: "At any rate the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. But before such testimony can be

received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532 (1941) (citations and footnotes omitted). Like any evidence, third party guilt proof can be irrelevant to a trial, or its relevance may be vastly outweighed by its tendency to confuse or mislead the jury, and thus crest the boundaries of the rules of evidence. Rule 403, SCRE. The Gregory formulation attempts to strike a balance, but one that is notoriously difficult to apply in the midst of a trial. Even the South Carolina supreme court has been tripped up by the concept. See Holmes v. South Carolina, 547 U.S. 319 (2006).

Courts sometimes use a shorthand version of Gregory that requires third party guilt be limited to "such facts as are inconsistent with the defendant's own guilt" and raise a reasonable inference of the defendant's innocence. But this distillation of the test, if strictly applied, unduly burdens a defendant. Instances of a third party's clear guilt and a defendant's corresponding innocence can typically be found only in the spontaneous courtroom confessions depicted in the fictional world of Perry Mason.

It could be argued here that proof of Ms. German's contemporaneous fraud spree at other pharmacies does not prove Ms. Miller innocent of the Walmart crime. It could be logically maintained that proof of similar crimes committed by a third party is never, without more, inconsistent with a defendant's own guilt, or enough to raise a reasonable inference of the defendant's innocence.

But all Gregory requires a defendant to do to have third party guilt admitted is furnish a "train of facts and circumstances, as tends clearly to point out such other person as the guilty party." The proof may derive from facts related to the commission of crimes other than the one for which the defendant is being tried. See Bruce R. Miller v. State of South Carolina, 379 S.C.

108, 665 S.E.2d 596 (2008) (granting PCR where trial counsel failed to effectively elicit third party guilt where defense was based on mistaken identity). The evidence concerning Ms. German's possible commission of the similar crime at Walgreens while using Ms. Miller's license furnishes several box cars of circumstances, if not a whistling train.

The United States Supreme Court has noted that the third party guilt rule as adopted in Gregory and many other jurisdictions is designed "to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Holmes, 547 U.S. at 330. As Holmes teaches, it is tricky for a court to weigh the logical connection by placing the State's evidence (and, consequently, the judge's thumb) on the opposing pan of the scale. Id. ("Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third party guilt has only a weak connection to the central issues in the case."). Juries, not judges, gauge the strength and credibility of the evidence.³

The connection between the Walmart and Walgreen's incident is not unduly remote. The presence of Miller's driver's license at both crimes provides a bridge allowing the Tracy German third party guilt evidence to enter the Walmart trial. The integrity of the bridge and the strength of its foundation are decisions only the jury is empowered to make.

V. Expert Eyewitness Identification

As in the Bruce R. Miller decision, where mistaken identity and third party guilt were an applicant's sole defense at trial, trial counsel's failure to call an eyewitness identification expert could have constituted prejudicial deficient performance. But Bruce R. Miller does not so hold,

³ An issue perhaps for another day is whether the third party guilt rule has been supplanted by Rules 401, 402 and Rule 403, SCRE. These rules, adopted in 1995, serve the important interests Gregory promotes. Some may argue the third party guilt rule is now a needless relic, whose sole function appears to be to confuse courts. If indeed the SCRE fully meets the State's interests, then to maintain the third party guilt rule would be unconstitutionally arbitrary to the extent it abridges a criminal defendant's right to meaningfully present a defense.


and as the concurrence points out, PCR cannot be granted on such ground where the potential expert testimony has not been proffered. See also Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008).

VI. Conclusion

There is a substantial probability that had third party guilt been pursued, it would have been admitted and could have affected the outcome. Miller has proven both deficient performance and prejudice. Therefore, her Motion for Reconsideration of the order denying her application for post-conviction relief is granted, her petition for Post-Conviction Relief is granted, and the case is remanded for a new trial. The previous Order of Dismissal is VACATED.

IT IS SO ORDERED!

April 16, 2015
Greenville, SC



D. Garrison Hill
Circuit Judge

Kenneth C. Gibson

Attorney at Law

Post Office Box 5536 • Greenville, SC 29606

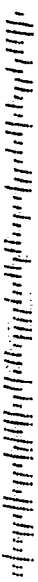


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