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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

George C. James, Jr., Circuit Court Judge

VLADIMIR WALT PANTOVICH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001433

REPLY TO STATE'S RETURN TO
PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

- I. **Petitioner would have been successful on appeal had a merits brief addressing the trial judge's refusal to give a good character instruction been filed where he introduced evidence of his good character at trial, the State conceded that the failure to charge was properly preserved, and the PCR court properly found that the evidence of Petitioner's guilt was *not* overwhelming.**

Petitioner raised the following issue in his Petition for Writ of Certiorari: Whether the PCR Court erred in (1) requiring Petitioner to show an irregularity in the Court's Anders¹ review procedure in order to establish the prejudice prong of ineffective assistance of appellate counsel, and (2) ruling that Petitioner was not prejudiced by appellate counsel's filing of an Anders brief rather than a merits brief on a preserved issue, the failure to give a good character instruction, that would likely have been successful on appeal if fully briefed?

As more fully discussed in the Petition for Writ of Certiorari, this case is about the PCR court's application of the incorrect standard of review to Petitioner's allegation of ineffective assistance of appellate counsel. The Order of Dismissal reflects the PCR court's belief that there is a presumption of regularity in the Anders procedure that must be rebutted by the applicant through the showing of some irregularity. App. 679 – 682. However, in Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 764 (2000), the United States Supreme Court held that “the proper standard for evaluating [a] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland.”² See also Bennett v. State, 383 S.C. 303, 309 n.6, 680 S.E.2d 273, 276 n.6 (2009) (stating that even where appellate counsel filed an *Anders* brief, “when analyzing a claim of ineffective assistance of appellate counsel, we apply the *Strickland* test”).

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

² Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

While the Robbins opinion includes the statement “[w]e thus presume that the result of the proceedings on appeal is reliable, and we require Robbins to prove the presumption incorrect in his particular case,” that statement related to the court’s rejection of the appellant’s argument for presumed prejudice. Id. at 284-89, 120 S.Ct. at 763-66. A complete reading of Robbins reveals that there is no additional hurdle for an applicant to overcome because their appellate attorney filed a no-merits brief. Rather, the Robbins court instructed that in applying the Strickland standard on remand:

Respondent must first show that his counsel was objectively unreasonable, in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If Robbins succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Id. at 285, 120 S.Ct. at 764. Thus, the PCR judge made an error of law in requiring that Petitioner “must also show an irregularity in the Court of Appeals’ Anders procedure to be entitled to a new trial” and present evidence that a meritorious issue “was overlooked by the Court of Appeals.” App. 679; App. 682. This error of law alone warrants certiorari.

There is no requirement in the applicable case law that the applicant present evidence regarding a court’s confidential review of a case following the filing of a no-merits brief. Unlike Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986), which involved testimony of the foreman of the grand jury, if this Court adopts the position of the PCR court and the State, the testimony of the three appellate judges who conducted the Anders review would be required at the PCR hearing. This unprecedented requirement is unnecessary given the clear mandate that the Strickland test be used to evaluate ineffectiveness regardless of whether appellate counsel filed a merits brief or an Anders brief. See Smith v. Robbins 528 U.S. 259, 287-88, 120 S.Ct. 746, 765-66 (2000). The Petitioner needed to prove deficient performance by showing that appellate

counsel Savitz's failure to discover and brief the character charge issue was objectively unreasonable. This was shown through the stipulation that the issue was preserved and the volume of case law regarding the trial court's duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. App. 639, 6 – 640, 1; App. 680 n.3; State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) ("It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits *reversible error* if it fails to give a requested charge on an issue raised by the evidence." (emphasis added)). Petitioner also needed to show "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." Robbins, 528 U.S. at 285, 120 S.Ct. at 764. This State's precedent makes clear that the failure to provide any instruction to the jury on the character evidence presented, when requested, requires reversal of the conviction and a new trial. See State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000). Thus, Petitioner met his burden of proof under both prongs of Strickland. No testimony was needed regarding the Court of Appeals' Anders review in order to meet this burden. See In re Whetstone, 354 S.C. 213, 580 S.E.2d 447 (2003) (holding that absent a critical, relevant reason otherwise, judges should not be called to testify regarding matters from a case over which they previously presided).

In its Return, filed May 26, 2015, the State argues that there are two additional sustaining grounds appearing in the record based upon which this Court should affirm the Order of Dismissal. See Rule 220(c), SCACR. Both of these arguments are without merit.

The State asserts that the Petitioner would not have been successful on appeal even if appellate counsel had filed a merits brief addressing the trial judge's refusal to give a good character

instruction, i.e. that Petitioner failed to demonstrate that he was prejudiced by appellate counsel's failure to brief the issue. The State argues both that the character evidence was not relevant to Petitioner's claim of self-defense and that any error in the failure to give the requested instruction was harmless.

To the extent that the State argues "harmless error," this contention was specifically rejected by the PCR court when it found that the evidence against Petitioner was not overwhelming. In its Order of Dismissal, the court wrote:

Respondent argued that even if Applicant had shown a deficiency in the procedure, he still cannot prove prejudice because there is overwhelming evidence of Applicant's guilt. See State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335 (1982) (holding that although a defendant is generally entitled to a good character instruction when he presents supporting evidence, he cannot show prejudice from the lack of the charge where there is overwhelming evidence of guilt). However, **the Court finds there was not overwhelming evidence of Applicant's guilt**, and decides this case based on Applicant's failure to rebut the presumption of regularity in the Court of Appeals' Anders review.

App. 679 – 680 (emphasis added). The State did not file a cross-appeal regarding this finding and should not be allowed to dispute it in its Return. See Sanders v. S.C. Dept. of Corrections, 379 S.C. 411, 418, 665 S.E.2d 231, 234 (Ct. App. 2008) (citing Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct.App.1999) (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue)); Rule 203(c), SCACR (detailing the proper procedure for filing a cross appeal). Rather, the PCR court's finding of a lack of overwhelming evidence of guilty must stand.

Nonetheless, a prejudice analysis in this case must be resolved in Petitioner's favor. See Cert. Pet. 18 – 24. The State attempts, unsuccessfully, to distinguish this case from State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000), and State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). In Harrison, the South Carolina Court of Appeals noted:

Indubitably, a defendant may introduce evidence of his good character. Generally, **where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt** and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant. The good reputation of the accused, if proved, may be taken into consideration by the jury in determining whether or not he committed the crime charged.

343 S.C. at 170, 539 S.E.2d at 73 (emphasis added). The court **reversed**, having first found that “[t]he trial court erred in failing to give the requested charge where the issue relating to Harrison’s good character and reputation was raised by the evidence.” 343 S.C. at 173, 539 S.E.2d at 75. It then rejected the State’s contention that the error was harmless in light of the evidence at trial. The court instead found that the jury may have reached a different verdict had it been properly “instructed that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant” and that the State did not present overwhelming evidence of Harrison’s possession of cocaine. *Id.* at 173-75, 539 S.E.2d at 75-76.

In Lee-Grigg, the State conceded that “[b]ecause Lee-Grigg presented evidence of good character and requested that the jury be charged on its use of that evidence, the trial court erred when it refused to give such a charge.” 387 S.C. at 317, 692 S.E.2d at 898. However, the State again argued “that the error was harmless because the evidence presented at trial conclusively established Lee-Grigg’s guilt.” *Id.* This Court disagreed, finding that the dispositive issue raised by her defense was whether she “believed in good faith that she was authorized to apply for reimbursement.” *Id.* Thus, the character evidence admitted was relevant to the jury’s evaluation of the defendant’s credibility and culpability, but the jury was without any instruction and thus unaware of how it could consider that evidence. *Id.* Accordingly, the failure to charge could not

be harmless and required reversal. Id. Thus, though neither Harrison nor Lee-Grigg involved a claim of self-defense, the analysis contained in both cases establishes that where evidence of a defendant's good character and good reputation is admitted, the jury must be instructed how such evidence can be considered in its analysis of the defendant's guilt.

The Harrison court distinguished State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982), because "Green admitted his presence and participation in the charged crime and, from the whole record, his guilt was conclusively established." 343 S.C. at 175, 539 S.E.2d at 76. It further stated "[u]nlike Green, the paucity of evidence of Harrison's guilt is glaring." Id. Green involved a trial for armed robbery in which this Court found that the defendant "admitted his presence and participation in the robbery and from the whole record his guilt is conclusively established." Thus, unlike the present case, Green did involve any absolute defense to which the character evidence would have been relevant.

Contrary to the State's assertion, the record does not "conclusively establish[] Petitioner committed voluntary manslaughter."³ The State cites to the facts that Petitioner caused the death of the victim by hitting her with a baseball bat and her blood was in Petitioner's house. That evidence is consistent with Petitioner's admission that he wielded the bat that caused the victim's death, but it does not prove that he acted in a sudden heat of passion rather than in self-defense. See Solomon v. State, 347 S.C. 635, 640, 557 S.E.2d 666, 669 (2001) (Toal, C.J., dissenting) ("A jury is required to presume that an accused is innocent until he is proven guilty. A defendant's admission of the underlying facts of the crime does not necessarily represent an admission by the defendant that

³ At Petitioner's trial, the solicitor did not object to the inclusion of some good character charge, but requested that court give a "more balanced" charge on character. App. 551, ll. 12-25. Additionally, the solicitor made no objection to the court's self-defense charge in this case. App. 593, l. 9 – 597, l. 19; App. 584, ll. 23-25.

he acted criminally or culpably. In fact, the defendant in this case plead not guilty, thereby placing the burden on the state to prove each and every element of the crime beyond a reasonable doubt.”). Additionally, Petitioner’s arrest on his way to his son’s home in North Carolina with the victim’s body in the trunk of his car is not dispositive. App. 438, ll. 1-25; 469, l. 8 – 470, l. 2; see State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (finding that defendant was entitled to a charge on self-defense despite his being found in Texas with his girlfriend’s dead body in the trunk of his car where he made a statement to police that it was “either her or me” and testified that in the preceding weeks the victim “had been acting jealous, following him, and had told him that if she ever caught him with another woman it was ‘going to be messy’”).

In the present case, the character evidence presented was relevant to Petitioner’s self-defense claim. See State v. Surbaugh, 737 S.E.2d 240, 254-57 (W.Va. 2012) (granting new trial for murder where defendant argued self-defense and good character and the trial court gave “no guidance to the jury via specific instruction or by the general charge on how to interpret evidence of good character”); State v. Banks, 664 S.E.2d 355, 358-59 (N.C. App. 2008) (granting new trial for first-degree murder and felonious discharge of a firearm where lower court precluded testimony of defendant’s character as a peaceful and law-abiding person in support of his assertion of self-defense); State v. Squire, 364 S.E.2d 354 (N.C. 1988) (granting new trial for murder where the trial court limited defendant’s presentation of character evidence, which “might have weighed heavily in the jury’s determination of whether the defendant acted in self-defense”). Petitioner’s character for peacefulness, including his prior peaceful reaction to aggression from the victim make it less likely that he was incapable of cool reflection, as required to prove voluntary manslaughter, but rather acted in self-defense.

Because Petitioner presented evidence of his good character, which was relevant to his claim of self-defense, it was error for the trial court to refuse to instruct the jury regarding how it could evaluate that evidence in its assessment of defendant's guilt or innocence. Thus, the PCR court erred in finding that Petitioner was not prejudiced by appellate counsel's decision to file an Anders brief where the overlooked charge issue was likely to be successful on appeal. As more fully discussed in the Petition for Writ of Certiorari, the PCR court's requirement that the applicant "rebut the presumption of regularity in the Court of Appeals' Anders review" in order to show prejudice was an error of law. Petitioner met his burden of proof and is accordingly entitled to reversal of the PCR court's denial and dismissal of his PCR application and a new trial.

II. There is no presumption of a valid strategic reason for the filing of an Anders brief, which should be filed only in those cases where appellate counsel finds from the record that an appeal would be frivolous, such that appellate counsel's testimony was not necessary at the PCR hearing.

The State asserts that this Court should affirm the denial of post-conviction relief because "Petitioner failed to present testimony from appellate counsel to rebut the presumption appellate counsel made a strategic decision to file an Anders brief." Ordinarily, "appellate counsel has no duty to raise every non-frivolous issue presented by the record and must be allowed to exercise reasonable professional judgment." State v. Roberts, 364 S.C. 583, 589, 614 S.E.2d 626, 629 (2005) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983)). Recognizing this, in Smith v. Robbins the United States Supreme Court nonetheless acknowledged that it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim and that it is actually easier to satisfy the first part of Strickland where appellate counsel filed a no merits brief, stating:

It is no harder for a court to apply *Strickland* in this area than it is when a defendant claims that he received ineffective assistance of appellate counsel

because his counsel, although filing a merits brief, failed to raise a particular claim. **It will likely be easier to do so.** In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. See, e.g., *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"). **With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present.** In both cases, however, the prejudice analysis will be the same.

528 U.S. at 287-88, 120 S.Ct. at 765-66 (emphasis added).

Notably, in its discussion of the proper framework for evaluation of a ineffectiveness of appellate counsel for failing to file a merits brief, the *Robbins* court stated that an appellant "must first show that his counsel was objectively unreasonable, in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Id.* at 285, 120 S.Ct. at 764. Markedly absent from the court's discussion was any presumption of strategy in filing an *Anders* brief, likely because **no such strategic reason exists**. Both the ethical rules and the *Anders* opinion make clear that if appellate counsel recognized a meritorious issue, that issue should be briefed. The *Anders* procedure is specifically reserved for those instances where appellate counsel determines after a "conscientious examination" of his client's case that an appeal would be frivolous. 386 U.S. at 744, 87 S.Ct. at 1400. This procedure was put into place because "the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client." *Id.*

Here, where the record makes clear that the jury instruction issue was preserved for appellate review, which the State conceded at the PCR hearing, there was no question that counsel's failure to discover the charge issue was unreasonable. App. 680 n.3. As discussed in the Petition for Writ of Certiorari and supra, the jury instruction issue was not only not frivolous, it was very likely to result in successful direct appeal had it been properly raised and briefed. Thus, appellate counsel's testimony at the PCR hearing was not necessary to prove ineffectiveness. Further, even had appellate counsel testified at the PCR hearing, such testimony would not be controlling in the face of the record that showed the properly preserved jury charge issue and the body of case law regarding its meritorious nature. There can be no strategic reason not to raise and brief an issue likely to prevail on appeal.

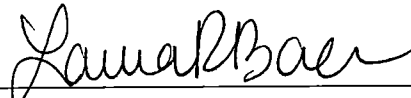
Therefore, neither "alternate sustaining ground" proposed by the State merits affirmance of the denial of Petitioner's PCR application. While it is a rare circumstance where both appellate counsel and the court will miss a meritorious issue in their review, it is not an impossibility. As discussed supra, the framework for applying the Strickland test in an Anders case such as this, announced in Robbins and adopted by this court in Bennett, requires a similar showing of deficient conduct by appellant counsel and resulting prejudice. The applicant must (1) "show that his counsel was **objectively unreasonable**, in failing to find **arguable issues to appeal**—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them;" and (2) "show a **reasonable probability** that, but for his counsel's unreasonable failure to file a merits brief, he **would have prevailed on his appeal**." 528 U.S. at 285, 120 S.Ct. at 764 (emphasis added). Notably neither prong requires a showing of any irregularity in the Anders procedure employed in the face of controlling precedent by the PCR court. Thus,

Petitioner met his burden of proof and is accordingly entitled to reversal of the PCR court's denial and dismissal of his PCR application and a new trial.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner Vladimir Walt Pantovich respectfully requests this Court grant certiorari to allow full briefing on the issue raised in his Petition.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer", is written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of June, 2015.

STATE OF SOUTH CAROLINA

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VLADIMIR WALT PANTOVICH,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001433

CERTIFICATE OF SERVICE

I certify that a true copy of the reply to state's return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Vladimir W. Pantovich, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 5th day of June, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of June, 2015.

Nancy Mendoza (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2022.