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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Clifton Newman, Circuit Court Judge

BRIAN GARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000019

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find counsel ineffective for not properly objecting to testimony and a report about gun shot residue found on Petitioner's hands almost two weeks after the charges for which he stood trial?

2. Did the PCR judge err in finding that the issue involving testimony about gun shot residue was briefed, argued and ruled upon by the South Carolina Court of Appeals on direct appeal when the issue raised on direct appeal did not involve the admission of the gun shot residue testimony but instead challenged the trial judge's denial of Petitioner's request to call an expert to rebut the reply testimony from the State's expert that the gun shot residue came from a pistol rather than a shotgun?

STATEMENT

In October of 2006, the Clarendon County Grand Jury indicted Petitioner Garris for armed robbery, assault and battery with intent to kill and possession of a weapon during the commission of a violent crime, indictment #2006-GS-14-0265. On September 2, 2008, Petitioner proceeded to jury trial before the Honorable George C. James, Jr. Garryl Deas represented Petitioner at trial. Amy Land prosecuted the case. The jury found Petitioner guilty as charged. Judge James sentenced Petitioner to twenty (20) years for armed robbery, twenty (20) years consecutive for assault and battery with intent to kill and five (5) years for possession of a weapon during the commission of a violent crime. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Garris, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011). On May 15, 2013, the South Carolina Supreme Court denied a timely filed petition for writ of certiorari.

On October 1, 2013, Petitioner filed an application for post conviction relief. The State filed a return on February 28, 2014. An evidentiary hearing was held on October 2, 2014, before the Honorable Clifton Newman. Charles T. Brooks represented Petitioner at the PCR hearing. Daniel Gourley represented the State. In a written order filed December 22, 2014, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was served on January 6, 2015. This petition for writ of certiorari follows.

ARGUMENTS

The PCR judge erred in refusing to find counsel ineffective for not properly objecting to testimony and a report about gun shot residue found on Petitioner's hands almost two weeks after the charges for which he stood trial.

On April 15, 2006, at approximately 10:00 PM Martha Santiago was robbed and shot as she was picking her daughter up from work at the China Cuisine restaurant in Manning. Almost two weeks later on April 28, 2006, police arrested Petitioner on an unrelated burglary charge. At the time of his arrest for the burglary charge, the police tested Petitioner's hands for gun shot residue [GSR]. Petitioner was 17 years of age at the time of his arrest. (App. p. 874, lines 19-21). Petitioner was found not guilty of the burglary charge prior to his trial on the armed robbery and assault and battery charge from the China Cuisine.

During the armed robbery trial a trustee from the Clarendon County Detention Center, Johnny McCrea, testified that on April 29, 2006, when he collected the food tray from Petitioner's cell, and emptied the tray, a gun fell into the trash. (App. pp. 303-308). Ballistics linked the gun to the armed robbery and shooting at the China Cuisine. (App. pp. 493-496). Prior to trial Petitioner objected to the admission of the gun found at the jail as well as any reference to Petitioner's burglary arrest based on Rule 403, SCRE. (App. pp. 53-74). The judge overruled the objection to the admission of the gun but agreed to give a limiting instruction about Petitioner's arrest without reference to the burglary charge. (App. p. 147, lines 3-10).

At trial Petitioner denied bringing the gun into the jail when he was arrested on the unrelated charge. (App. p. 573, lines 3-18). On cross examination the prosecutor asked Petitioner if, on April 28, 2006, the day of his arrest on the unrelated charge, he handled a firearm. (App. p. 648, line 18 – p. 649, lines 1-21). Petitioner denied handling a gun on the day of his arrest, denied handling the gun found at the jail and denied owning a gun. (App. p. 649, lines 22 – p. 650, lines 1-

6). The prosecutor asked, **without objection**, if Petitioner had ever fired a gun. (App. p. 650, line 7). Petitioner admitted firing a gun but not on April 28th. (App. p. 650, lines 8-10). The prosecutor then asked, "When was the last time you fired a gun from that day?" (App. p. 650, line 11). Counsel objected on the ground of relevance and the judge overruled the objection. (App. p. 650, lines 13-14). Petitioner answered the question, "As I testified earlier, I have shot a gun before, but to my recollection I shot a rifle on the 27th." (App. p. 650, lines 15-16).

In reply the State sought to introduce testimony in regard to the positive GSR test from the day of Petitioner's arrest on the unrelated burglary. Trial counsel objected stating, "I object to his testimony on relevance and he's going to have to reference the prior arrest for the burglary case he was already tried and found not guilty. " (App. p. 691, lines 7-10). The State proffered the testimony of Investigator Ham, who tested Petitioner's hands for GSR on April 28, 2006, and Agent Roberts who tested the sample and found GSR. (App. pp. 691-708). The judge *sua sponte* questioned Agent Roberts.

> Judge: Did your testing, your field of expertise, in this case can you develop an opinion to a reasonable degree of certainty whether the handling or the firing a pistol as opposed to a rifle?
>
> Roberts: I could make a general, not to a reasonable degree of certainty.
>
> Judge: Most Probably?
>
> Roberts: Most Probably.
>
> Judge: All right, sir. What's that?
>
> Roberts: A pistol because I've seen the firearms in question, it's close to your hands, whereas a rifle, you've got your hands stretched away form the exit portion -- you have one that fairly close. A rifle is also a closed, a more closed system than a handgun.

(App. p. 705, lines 7-20).

Trial counsel objected to the testimony as not relevant and not proper credibility impeachment evidence. (App. p. 709, lines 2-25). Trial counsel did not object to the testimony as a violation of Rule 608 (b), SCRE. The judge ruled, "Okay. Mr. Deas, I'm going to allow the testimony to the jury and I think – I might be wrong, might be 100 percent right. Not 100 percent right, but you might be enough right to where this is an issue that can be visited at a later time by another court, but I'm going to allow the evidence." (App. p. 712, lines 17-22).

Both Investigator Ham and Agent Roberts testified before the jury. Agent Roberts testified that it was most likely that Petitioner fired a firearm within six hours of the GSR test. (App. p. 734, lines 14-18). Agent Roberts also testified that the weapon fired in this case was most likely a pistol. (App. p. 736, lines 1-13). Trial counsel objected. This time the basis of the objection was not relevance but rather the opinion as to pistol rather than rifle was not included in the Agent's report. (App. p. 736, lines 9-10). The judge overruled the objection. (App. p. 736, line 11). Agent Roberts' GSR report was admitted in evidence subject to the previous objections, none of which included an objection based on Rule 608(b).

Trial counsel was first deficient in failing to object, as a violation of both Rule 608(b) and Rule 404(b), SCRE, to the prosecutor questioning Petitioner if he had ever fired a gun. Petitioner was 17 years of age at the time of his arrest. (App. p. 874, lines 19-21). Counsel's deficient performance was further compounded when he failed to object to the GSR testimony as a violation of Rule 608(b). During the PCR hearing the PCR judge stated, "Mr Deas [trial counsel] objected to everything, and I'm trying to think of what else Mr. Deas could have done that he didn't do except convince the jury that there is not enough." (App. p. 906, lines 3-6). Trial counsel should have objected to the GSR testimony and report as a violation of Rule 608(b), SCRE.

In the order of dismissal the PCR judge wrote, "This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to object to Agent Robert's report dealing with gunshot residue to be without merit. Initially, this Court notes the issue of whether the Trial Court erred in denying his motion to suppress the gunshot residue was briefed, argued, and ruled upon by the South Carolina Court of Appeals. State v. Garris, Op. No. 4859 (S.C.Ct.App. filed August 10, 2011)." (App. p. 918). This is clear error and addressed in issue two.

The PCR judge additionally wrote in the order of dismissal, "This Court finds Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court notes Applicant can show no prejudice as this issue was properly objected to by Trial counsel during the course of the trial and preserved for appellate review." (App. p. 918). The PCR judge erred. Counsel was deficient in failing to properly object to the GSR testimony and report as a violation Rule 608(b). The issue was not raised on direct appeal.

In Wilder v. State, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010) this Court wrote:

> Under Rule 608(b)(1), a trial judge may allow a witness to be cross-examined about "specific instances of [that witness's] conduct" if the trial judge, in his discretion, finds these instances probative of the witness's credibility. An abuse of discretion occurs when the trial court's ruling lacks evidentiary support or where it is controlled by an error of law. E.g., State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

If counsel had objected to the State asking Petitioner if he had ever fired a gun, the judge would have abused his discretion in overruling the objection because firing a gun is not probative of truthfulness. Petitioner never denied firing a gun. The question was improper as a violation of both Rule 608(b) and Rule 404(b), SCRE. The question was not probative of truthfulness, as required by

rule 608(b), and the answer to the improper question constituted improper bad act evidence under Rule 404(b).

In State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000), this Court found that the trial court properly limited the cross examination by the defense of a State's witness writing:

> Prior bad acts which are not the subject of conviction, such as the dismissed indictments here, may only be inquired into, "in the discretion of the court, if probative of truthfulness or untruthfulness." Rule 608(b), SCRE. Narcotics offenses are generally not considered probative of truthfulness. See, e.g., United States v. Turner, 104 F.3d 217, 223 (8th Cir.1997) ("Misconduct involving violations of narcotics laws is not an act involving dishonesty or untruthfulness and therefore may not be inquired into under Federal Rule of Evidence 608(b)."). Nor are the dismissed indictments evidence of "bias, prejudice or any motive to misrepresent" under Rule 608(c).

Just as the defense was limited in cross examining the State's witness in Aleksey, the State, upon proper objection by trial counsel, should have been limited in cross examination of Petitioner. The error in the present case was especially prejudicial where the trial judge had crafted a limiting instruction allowing the jury to know that Petitioner had been arrested and was in jail but not allowing the jury to know he had been arrested for burglary. With admission of the GSR evidence, the jury was told that Petitioner had been arrested for a charge that involved the firing of a pistol, evidence that was highly prejudicial in the trial for armed robbery and assault and battery with intent to kill. The admission of the GSR evidence erased the protection of the limiting instruction.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an

objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to properly object to the GSR evidence. Petitioner was prejudiced by the deficient performance. Evidence of GSR on Petitioner's hands two weeks after the armed robbery charge for which he stood trial lacked probative value and was highly prejudicial. See State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986). There is a reasonable probability that if trial counsel had **properly objected** to the GSR evidence, the trial judge would have excluded the evidence and the result of the proceeding would have been different.

2. The PCR judge erred in finding that the issue involving testimony about gun shot residue was briefed, argued and ruled upon by the South Carolina Court of Appeals on direct appeal when the issue raised on direct appeal did not involve the admission of the gun shot residue testimony but instead challenged the trial judge's denial of Petitioner's request to call an expert to rebut the reply testimony from the State's expert that the gun shot residue came from a pistol rather than a shotgun.

As discussed above, in the order of dismissal the PCR judge wrote, "This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to object to Agent Robert's report dealing with gunshot residue to be without merit. Initially, this Court notes the issue of whether the Trial Court erred in denying his motion to suppress the gunshot residue was briefed, argued, and ruled upon by the South Carolina Court of Appeals. State v. Garris, Op. No. 4859 (S.C.Ct.App. filed August 10, 2011)." (App. p. 918). This is clear error.

In State v. Garris, 394 S.C. 336, 341-42, 714 S.E.2d 888, 891 (Ct. App. 2011)(footnotes omitted) the South Carolina Court of Appeals wrote:

> Brian Garris appeals his convictions of armed robbery, assault and battery with intent to kill (ABWIK), and possession of a firearm during the commission of a violent crime. Garris argues the trial court erred in denying: (1) his motion to dismiss the case or declare a mistrial pursuant to Rule 5, SCRCrimP, or Brady v. Maryland; (2) his motion to suppress a gun found in the jail after his arrest on an unrelated charge; (3) his request to call an expert to rebut the State's expert's opinion testimony when the opinion was not contained in the expert's report; and (4) his Batson v. Kentucky motion and motion to set aside the jury because the State's peremptory challenges were racially motivated and eliminated all African–American males from the jury. We affirm.

After the admission of Agent Roberts' improper GSR testimony and report, trial counsel moved to rebut Agent Roberts' by calling a defense expert. (App. p. 749, lines 7-19). The motion was based on the fact that Agent Roberts' opinion that the GSR indicated that Petitioner had fired a pistol rather than a rifle had not been included in Agent's report provided in discovery. (App. p. 749, lines 14-17). This opinion was elicited by the judge *sua sponte*. The trial judge denied the motion to rebut Agent Roberts' testimony with a defense expert witness.

(App. p. 749, line 20). This was the issue raised on direct appeal. The admission of the GSR evidence was not raised on direct appeal because trial counsel did not properly object to it, as discussed in issue one.

The Court of Appeals ruled:

> On appeal, Garris argues the court prevented him from presenting a complete defense by not allowing him to call his own expert to rebut Roberts' testimony. He asserts he was prejudiced by the inability to call his own expert because Roberts' opinion was not in his report.
>
> The State put Roberts on the stand in reply to rebut Garris' testimony that he did not own a pistol and had not shot one the day of the incident. Thus, Roberts' testimony was properly limited to a reply to Garris' testimony, and Garris cannot claim he did not have an adequate opportunity to contest the evidence. See Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (holding the limited nature of the rebuttal evidence did not substantiate appellant's claim that it was without an adequate opportunity to contest such evidence because the issues addressed in rebuttal were the identical issues identified and pursued by appellant's own witness). Additionally, Garris was able to cross-examine Roberts about his opinion.
>
> Therefore, we find Garris has failed to demonstrate how he was prejudiced by not being permitted to call his own expert to rebut Roberts' testimony, and the trial court did not err in denying Garris' request to call an expert to rebut the State's expert's testimony.

State v. Garris, 394 S.C. 336, 351-52, 714 S.E.2d 888, 896-97 (Ct. App. 2011). The PCR judge erred in finding that the issue of whether the trial court erred in denying his motion to suppress the gunshot residue was briefed argued, and ruled upon by the South Carolina Court of Appeals.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Clifton Newman, Circuit Court Judge

BRIAN GARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000019

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Brian Garris #330406 at Kirkland Correctional Institution, this 26th day of August, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of August, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .