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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

OCTAVIA MIDDLETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001080

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Did the PCR judge err refusing to find appellate counsel ineffective for failing to challenge the trial judge's admission, over objection, of Petitioner's inculpatory statement taken after Petitioner invoked his right to remain silent and his right to counsel?

STATEMENT

In September of 2005, the Richland County Grand Jury indicted Petitioner Middleton for three counts of assault and battery of a high and aggravated nature, five counts of armed robbery, two counts of burglary first degree, one count of assault with intent to kill and one count of murder. On August 27, 2007, Petitioner proceeded to jury trial before the Honorable G. Thomas Cooper Jr. Steve Hisker represented Petitioner at trial. Kathryn Luck Campbell and Daniel Goldberg prosecuted the case. The jury returned verdicts of guilty as charged. Judge Cooper sentenced Petitioner to an aggregate sentence of fifty (50) years. A timely notice of intent to appeal was filed and the direct appeal perfected. Joseph L. Savitz represented Petitioner on appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Middleton, Op. No. 2010-UP-294 (S.C.Ct.App. filed May 27, 2010).

On July 23, 2010, Petitioner filed an application for post conviction relief, 2010-CP-40-4866. The State filed a return on February 8, 2011. An evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. on January 10, 2012. Robert Fitzsimons represented Petitioner at the PCR hearing. Bryan T. Petrano represented the State. In a written order signed February 21, 2012, Judge Kinard denied relief and dismissed the application.

On June 4, 2014, Petitioner filed a second application for post conviction relief, 2014-CP-40-3607. On October 28, 2014, the State filed a return and motion to dismiss all claims beyond Austin review. On April 2, 2015, a hearing was held before the Honorable Brooks P. Goldsmith. Jonathan Waller represented Petitioner. J. Clayton Mitchell, III represented the State On April 12, 2015, Judge Goldsmith signed a consent order granting an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). This Austin petition for writ of certiorari and a separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred refusing to find appellate counsel ineffective for failing to challenge the trial judge's admission, over objection, of Petitioner's inculpatory statement taken after Petitioner invoked his right to remain silent and his right to counsel.

Prior to trial Petitioner moved to suppress a statement made to an investigator with the Richland County Sheriff's Department after Petitioner invoked his right to remain silent and his right to counsel. (App. pp. 90 – 94; p. 108-111). During the pre-trial hearing Sergeant John Ewing, formerly with the Richland County Sheriff's Department, testified that he advised Petitioner of his Miranda rights and Petitioner signed the advice of rights form, marked as State's exhibit#1 for ID. (App. p. 21, lines 5-24). Deputy Chief David Wilson witnessed the advisement of rights. (App. p. 21, lines 7-12). The advice of rights is dated August 11, 2005 at 12:41 hours. (App. p. 22, lines 11-12). Sergeant Ewing advised Petitioner he was investigating a murder at a gambling house inside apartments on Faraway Drive. (App. p. 24, line 24 – p. 25, lines 1-7). Petitioner told the Sergeant that he had been to the gambling house on a prior occasion but was not there on the night of the murder. (App. p. 25, lines 3-7).

Sergeant David Linfert then came into the room and also began questioning Petitioner. (App. p. 25, lines 8-10). Petitioner admitted that he had been at the gambling house on several prior occasions but maintained that he was not there on the night in question. (App. p. 25, lines 15-18). Sergeant Ewing received information from another investigator working on the case, Investigator Faust, that during the search of Petitioner's home he found a basketball jersey matching a description of the clothing worn by the suspects and the jersey appeared to have a blood stain. (App. p. 25, line 19 – p. 26, lines 1-2). When confronted with this information, Petitioner stated, "You're not going to find the blood on my shirt. There is no blood on there." (App. p. 26, lines 3-6). Petitioner then stated, ""I don't want to talk any more. I'd like to speak with my attorney."

(App. p. 26, lines 7-8). According to Sergeant Ewing, prior to invoking his right to remain silent and his right to counsel, Petitioner told him that a co-defendant, Teran Scott brought the shotgun shells that were dound at Petitioner's home when he was taken into custody. (App. p. 26, lines 9-17).

Sergeant Ewing testified that he called Petitioner's attorney but could not reach her so he placed Petitioner in a holding cell, or the "D" cell at the Richland County Sheriff's Department rather than transporting him to the jail for booking. (App. p. 26, line 20 – p. 27, lines 1-8). Sergeant Ewing then assisted Investigator Holdorf with the interrogation of another co-defendant, Harry Dukes. (App. p. 27, lines 9-20). After the interrogation of Dukes, another investigator, Investigator Barnes advised Sergeant Ewing that someone in the holding cell wanted to speak with him. (App. p. 27, line 24 – p. 28, lines 1-11).

According to Sergeant Ewing, when he went to the holding cell, Petitioner told him he wanted to speak to him in private. (App. p. 28, lines 12-14). Sergeant Ewing took Petitioner out of the holding cell and told him, "Listen. I don't want to waste any more of my time talking with you if you're not going to tell me the truth of what happened." (App. p. 28, lines 15-17). Sergeant Ewing testified that at that point Petitioner admitted being at the gambling house on the night in question but denied shooting anybody and did not want to get charged with murder fro something someone else did. (App. p. 28, lines 17-21).

Sergeant Ewing then asked yet another investigator, Investigator Godfrey to sit in on the interrogation. (App. p. 29, lines 8-16). The Sergeant testified, "So I told Godfrey, Investigator Godfrey, I said, 'This is Octavia Middleton.' I said, 'He's being charged with murder. He originally said that he wanted to talk with an attorney but now he's requesting to speak with me again.' And Godfrey stated okay. And I then turned and looked at Octavia and didn't say anything, and Octavia

started telling his side of events and his side of the story" (App. p. 29, lines 17-24). The verbal statement was reduced to writing and marked at the pre-trial hearing as States' exhibit #2 for ID. (App. p. 30, lines 1-10). According to the prosecutors, the written statement was taken at 3:41 PM. (App. p. 66, lines 5-13). In the first three questions in the written statement, obtained after the verbal statement, Petitioner acknowledged the prior invocation of rights, acknowledged telling Investigator Barnes he wished to speak with Sergeant Ewing and confirmed that he wished to continue and speak with Sergeant Ewing. (App. p. 30, line 11 – p. 31, lines 1-9). Sergeant Ewing did not advise Petitioner of his Miranda rights prior to either the verbal or the written statement obtained after the invocation of the right to remain silent and the right to counsel. (App. p. 34, lines 7-10).

Petitioner testified at the pre-trial hearing that:

> While I was in the D cell, one of the officers who investigated was questioning me along with another officer approached the D cell with a statement from Harry Dukes. They opened the cell and they advised me, they told me that your co-defendant have implicated you. Well, they said Harry Dukes have implicated you as being part of this crime. And they told me that it would be in my best interest to cooperate with them at this point because if not then they would make sure that I spend the rest of my life in jail. And they then left the tank for me to think about what they had just presented to me.

(App. p. 50, line 18 – p. 51, lines 1-4). Petitioner did not attempt to contact Sergeant Ewing until after the officers told him that co-defendant Dukes implicated him. (App. p. 51, lines 7-12).

Petitioner, while still at the Richland County Sheriff's Department on August 11, 2005, was advised of his Miranda rights a second time at 6:20 PM, this time by Investigator McDaniels. (App. p. 70, lines 6-25). Investigator McDaniels questioned Petitioner about a different shooting that took place in July on Greystone Blvd. (App. p. 74, lines 1-24). Investigator McDaniels testified that Petitioner confirmed that the same gun from the Greystone Blvd shooting was used in the

Faraway Dr. shooting on August 8, 2005.. (App. p. 74, lines 13-24). The statement was reduced to writing and marked as State's Exhibit #4.

Petitioner then moved to suppress all statements based on the fact that law enforcement re-initiated contact with Petitioner in the holding D cell after Petitioner invoked his right to remain silent and right to counsel. (App. pp. 90, 91, 92, 93, 94, lines 1-2). As to the second written statement given to Investigator McDaniel, trial counsel appears to have limited limit his ground for suppression to voluntariness. (App. p. 96, lines 7-24). Petitioner continued to argue for suppression of the second verbal statement and first written statement given to Sergeant Ewing after Petitioner invoked his right to remain silent and right to counsel. (App. p. 98, lines 4-21; pp. 108-111).

The judge found all statements admissible. (App. pp. 114-119). The judge ruled as follows:

> There has been testimony from the law enforcement that nobody did what he said they did. It's sort of hard to prove a negative. But the people who were there, both Barnes and Holdorf, indicated said it was not them that went to the defendant with Mr. Dukes' statement. And so all I have to base that decision on is the defendant's statement when I've got at least two officers saying they didn't do it. And the fact that somebody could have done it is not sufficient evidence to exclude the second statement [first written statement].

(App. p. 116, line 22 – p. 117, lines 1-7). Petitioner renewed the objection at trial. (App. p. 608, lines 12-13). The trial judge erred. The second verbal statement and the first written statement given to Sergeant Ewing after Petitioner invoked his right to remain silent and right to counsel should have been suppressed. The State had the burden to prove that Petitioner, not law enforcement, re-initiated contact after the invocation of rights. The judge's finding that "somebody could have done it is not sufficient to exclude the second statement" improperly shifts the burden of proof. The State failed to meet its burden of showing that Petitioner initiated contact with the law enforcement after he invoked his right to remain silent and right to counsel.

In State v. Johnson, 413 S.C. 458, 466-67, 776 S.E.2d 367, 371 (2015), this Court wrote:

> When analyzing a criminal defendant's invocation of her right to counsel, a trial court must make two separate inquiries:
>
> First, courts must determine whether the accused actually invoked his right to counsel. See, e.g., Edwards v. Arizona, 451 U.S. at 484–85 [101 S.Ct. 1880] (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); Miranda v. Arizona, 384 U.S. at 444–45 [86 S.Ct.1602] (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, 451 U.S. at 485, 486, n. 9 [101 S.Ct. 1880]. Smith v. Illinois, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (per curiam).

In the present case there is no question that Petitioner unambiguously invoked his right to remain silent and his right to counsel. The State argued, however, that Petitioner initiated further discussion with the police. (App. p. 94, line 4 – p. 95, 96, lines 1-6; pp. 112 – 113). The State failed to prove that Petitioner was the one who initiated further discussion with the police. Petitioner testified that two officers initiated contact with him in the holding D cell after he invoked. While the trial judge correctly noted that Investigators Barnes and Holdorf denied initiating contact with Petitioner in the D cell after Petitioner invoked his rights, there were at least five other investigators involved in the case who did not testify at the pre-trial hearing: Deputy Chief David Wilson; Sergeant David Linfert, Investigator Faust, Investigator Godfrey and Captain Smith.

Once it is established that the defendant requested the assistance of an attorney, the government must show by a preponderance of the evidence that the defendant reinitiated further communication with the police to avoid violation of the Edwards rule. See Maryland v. Shatzer, 559 U.S.98, 130 S.Ct. 1213, 1224, 175 L.Ed.2d 1045 (2010). The defendant must freely initiate communication and not be coerced or pressured into communicating with police. Id. at 1220

(quoting Minnick v. Mississippi, 498 U.S. 146, 153, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990)). The State failed to show by a preponderance of the evidence that Petitioner reinitiated further communication with the police **before** two officers approached Petitioner in the D holding cell and presented him with the statement of his co-defendant Dukes. Petitioner was coerced or pressured into talking with police after he was presented with the statement of his co-defendant, **after** he invoked his rights.

Additionally, the verbal and written statements provided to Sergeant Ewing after Petitioner invoked should have been suppressed because Petitioner's right to cease questioning was not "scrupulously honored." In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) the United States Supreme Court held that the fact that a suspect invokes his right to remain silent is not a permanent bar to police reinitiating contact with the suspect. In Mosley the Court held that the admissibility of statements obtained after the person in custody has decided to remain silent under Miranda depends on whether his right to cut off questioning was "scrupulously honored." In State v. Benjamin, 345 S.C. 470, 476-77, 549 S.E.2d 258, 261 (2001), this Court wrote:

> Courts interpreting Mosley have set forth five factors to analyze to ascertain whether the defendant's right to cut off questioning was "scrupulously honored": (1) whether the suspect was given Miranda warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of Miranda warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. Burket v. Angelone, 208 F.3d 172 (4th Cir.2000). See also Roundtree v. Commonwealth, 2000 WL 724026 (Va.App.2000); Wisconsin v. Badker, 240 Wis.2d 460, 623 N.W.2d 142 (2000); State v. Brooks, 505 So.2d 714, 722 (La.), cert. denied, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987).

In Benjamin, this Court found that the Mosely "factors are not exclusively controlling" but, rather, "provide a framework for determining whether, under the circumstances, an accused's right to silence was scrupulously honored." 345 S.C. 470, 476–77, 549 S.E.2d 258, 261.

Petitioner's right to remain silent was not scrupulously honored in the present case. Again, there is no question that Petitioner unambiguously invoked his right to remain silent and his right to counsel. Immediately following the invocation, rather than immediately ceasing the interrogation, the Sergeant, in Petitioner's presence, called Petitioner's attorney. When the Sergeant was unable to contact the attorney, he placed Petitioner in a holding cell at the Richland County Sheriff's Department, rather than transporting him to the detention center for booking. As discussed above, the State failed to prove that Petitioner initiated contact with the police **before** two officers approached him in the holding cell with his co-defendant's statement.

Applying the five Mosely factors, while Petitioner was initially advised of his Miranda rights at 12:41, he later invoked both his right to counsel and his right to remain silent, Sergeant Ewing did not immediately cease questioning but instead tried to make contact with a lawyer, while still in Petitioner's presence at the Richland County Sheriff's Department. Sergeant Ewing resumed questioning approximately three hours later. It appears that Petitioner remained in the D holding cell at the Richland county Sheriff's Department for much of that time. Three hours is not a significant period of time. Sergeant Ewing admitted that he did not provide a fresh set of Miranda warnings before the second interrogation. (App. p. 34, lines 7-10). The second interrogation, after the invocation of rights, involved the shooting at the gambling house on Faraway Drive, the subject of the first interrogation in which Petitioner invoked his rights. Under the Mosely framework of analysis, Petitioner's right to remain silent was not scrupulously honored.

The judge ruled that the first three questions appearing on the written statement, taken after the verbal statement, constituted a valid waiver of the right to remain silent. (App. p. 115, line 17 – p. 116, lines 1-14). The judge erred. The judge later noted,

> And the fact that the defendant after – I mean, even if I take what he says as correct and believe that making that second statement was done – even if I did think that – was done without proper warnings, the fact that he admits to the gun and the shotgun shells after a second set of Miranda warnings goes to me – I mean, it seems to me that that confirms my decision to allow the second – I mean the first written statement into evidence.

First, the first three questions in the written statement, obtained after the verbal statement, do not constitute a valid waiver. Second, the first written statement given to Sergeant Ewell, admitting being present at the scene, is far more damaging than the written statement given to Investigator McDaniel admitting that the same weapon was used in two incidents. Third, if complete Miranda warnings had been provided after the verbal statement but prior to the written statement, the statements should still have been suppressed pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). Appellate counsel was ineffective in failing to challenge the trial judge's admission of statements made to Sergeant Ewing after Petitioner invoked his right to remain silent and right to counsel.

In the order of dismissal the PCR judge wrote, "The trial judge ruled on the Denno issue in a detailed manner with the necessary credibility findings. (Tr. p. 114-121). The Applicant had not explained how the trial court's ruling was an error of law or an abuse of discretion. There is no merit to the Applicant's claim that appellate counsel was ineffective for failing to argue the Denno ruling on appeal." (App. pp. 1013-1014). The PCR judge erred.

In Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) the South Carolina Supreme Court wrote:

> A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

Appellate counsel was ineffective in failing to raise the meritorious claim that the judge erred in refusing to suppress statements made after Petitioner invoked his right to remain silent and right to counsel in violation of Miranda, Edwards and Seibert. Petitioner was prejudiced by appellate counsel's deficient performance. There is a reasonable probability that if appellate counsel had raised the issue in regard to the erroneously admitted verbal and written to statements to Sergeant Ewing, Petitioner would have prevailed on direct appeal and a new trial would have been granted.

CONCLUSION

Based on the above argument, 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 7th day of January, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

OCTAVIA MIDDLETON,

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V.

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 7th day of January, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2016

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.