

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Thomas A. Russo, Circuit Court Judge

CHARLTON L. HILL,

V.

STATE OF SOUTH CAROLINA,

PETITIONER,

RESPONDENT

APPELLATE CASE NO 2015-002428

PETITION FOR WRIT OF CERTIORARI

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2. The PCR court erred in not finding trial counsel ineffective for failing to investigate Petitioner’s case timely and then asking for a continuance at trial in order to talk to witnesses who were significant to Petitioner’s defense that he was not the driver as they observed the petitioner and his wife just prior to the incident, and trial counsel knew approximately six weeks earlier that the case was being called for trial that term.9

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ISSUES PRESENTED

1. Did the PCR court correctly grant a belated direct appeal review pursuant to White v. State , 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney filed the notice of appeal one day late?

2. Did the PCR court err in not finding trial counsel ineffective for failing to investigate Petitioner's case timely and then asking for a continuance at trial in order to talk to witnesses who were significant to Petitioner's defense that he was not the driver as they observed the petitioner and his wife just prior to the incident, and trial counsel knew approximately six weeks earlier that the case was being called for trial that term.

STATEMENT

On January 8, 2010 in Darlington County, Trooper David Gainey with the South Carolina Highway Patrol, observed a 2005 Chevy Cobalt run off the shoulder of the road several times which made the trooper think the driver might be under the influence. Trooper Gainey followed the car and activated his car camera mounted in the windshield to record evidence as he did with every traffic stop. App. 130, ll. 17 – App. 134, ll. 25.

Trooper Gainey activated his blue light and the car appeared to be slowing down to stop. As the trooper exited his car, he testified that he could see the driver whom he described as a “gentleman with short hair, kind of salt and pepper.” App. 137, ll. 11 – 24. Suddenly, the Cobalt sped away with Trooper Gainey in pursuit. The trooper reached speeds of around one hundred miles per hour. The Cobalt vehicle did not make a bend in the road and ran off the road flipping end over end several times. App. 91, ll. 1 – 24. The Cobalt vehicle traveled two hundred and three feet when it hit a dead pine tree lying in the ditch line. The car continued to travel eighty-eight more feet before it stopped two hundred and ninety-one feet from the time the car left the roadway. App. 196, ll. 16 – App. 201, ll. 12.

When Trooper Gainey approached the crashed car, he found Petitioner Hill in the driver’s seat holding the steering wheel. The trooper said that Hill smelled of alcohol. About thirty seconds later, Trooper Gainey found the body of Hill’s wife, Sylvia Hill, about six feet from the car. She was deceased at that point due to extensive injuries. App. 137, ll. 25 – App. 138, ll. 22; App. 105, ll. 1 – 25.

The forensic pathologist who performed the autopsy testified that something hit Sylvia Hill very hard in her upper body. Her head and neck were almost detached from her body when she was found outside of the car. The top of her head was torn away, and she had severe tearing

on her body. Death was due to the avulsion of the brain, heart, and lung which were “torn out of the body due to blunt force trauma of the upper body due to a motor vehicle collision.” App. 252, ll. 1-23; App. 254, ll. 15 – App. 256, ll. 7. The toxicologist was not able to test the victim’s blood because they were unable to obtain blood from her because she “bled out.” App. 236, ll. 17 – App. 237, ll. 11.

The forensic investigator, Russ Harrell, testified at trial that he found in the crashed car four beer cans. Three were empty and the fourth was partially empty. He found the passenger seat completely pushed down to the rear with the head rest missing. He also found two logs in the car; one was hanging out of the back door. The end of one of the logs had some fabric; what appeared to be hair; and apparent blood. App. 167, ll. 10 – App. 168, ll. 24; App. 178, ll. 3 – App. 179, ll. 23; App. 184, ll. 15 – App. 185, ll. 12.

Petitioner Hill was transported to the hospital by EMS. On the way while he was in the ambulance, the EMS worker, Michelle Quick, asked Hill if he had consumed any alcohol. Hill responded to her that he had consumed two twenty-two ounce beers, Xanax, and Soma which was a muscle relaxer. Defense counsel objected. App. 102, ll. 1 – App. 104, ll. 25.

A blood sample was taken from Hill by implied consent after he was arrested for felony DUI with death. App. 121, ll. 1 – 25. The toxicology report indicated that Hill’s blood alcohol level was .152. The report also indicated that other chemicals were found such as metabolites of cocaine and marijuana, hydrocodone, Benadryl, tramadol, Soma. App. 218, ll. 1 – App. 219, ll. 2. On September 10, 2010, the Darlington County Grand Jury Indicted Hill for felony driving under the influence with death resulting and driving under suspension (DUS). On April 11, 2011, he was indicted for failure to stop for a blue light (FTSBL) with death resulting; reckless homicide; and involuntary manslaughter. App. 600 – App. 614.

On April 13, 2011, Hill proceeded to trial before the Honorable J. Michael Baxley and a jury. Hill was represented by Emily Crayton and Matthew S. Swilley. The state was represented by John Holt, Kendall Burch, and Patti McKenzie-Parker. App. 1.

At trial, Hill's defense was that he was not driving the Chevy Cobalt vehicle. App. 95, ll. 15 – App. 96, ll. 25. In a pretrial motion, defense counsel moved for a continuance in order for him to talk to witnesses who would testify in defense of Hill. One was his mother who was in a nursing facility but who was lucid as counsel said he did visit her and talk with her the day before. Counsel believed she was competent to testify. However, she needed more time to “convalesce” due to the physical condition in order to attend court. App. 76, ll. 6 – 23.

The other witness was Mackie Tomlinson who would testify as to what he observed when Hill and his wife left Tomlinson's home just prior to the accident. Counsel had talked to Tomlinson's brother the previous week who said Tomlinson was in a rehabilitation facility but would not say where. Counsel said to the court: “I think a continuance would allow the defense to speak to Mr. Tomlinson as well. And I would move for a continuance on these grounds.” App. 76, ll. 23 – App. 77, ll. 9.

The judge denied the motion because counsel admitted that he learned on March 7, 2011 that Hill's trial would be this term which was April 13, 2011. The judge said that was almost five weeks before trial so he denied the motion. App. 77, ll. 10 – App. 78, ll. 14.

At trial, when the video from Trooper Gainey's car, State's Exhibit 121, was entered into evidence, defense counsel objected pursuant to Rule 403, SCRE as being more prejudicial than probative and “overly cumulative.” The judge overruled this objection and the video was published to the jury. App. 135, ll. 12 – 23.

The jury found Hill guilty on all charges as indicted. App. 323, ll. 1 – 25. The judge sentenced Hill to twenty-five years on the felony DUI with death; to ten years on the reckless homicide; five years on the involuntary manslaughter. These sentences were to run concurrent. On the FTSBL with death, the judge sentenced him to a consecutive sentence of ten years. App. 341, ll. 8 – App. 343, ll. 23.

Hill's attorney filed a notice of appeal one day late. The Court of Appeals dismissed the appeal as untimely on May 24, 2012. App. 590; App. 403 – App. 406.

On March 25, 2013, Petitioner Hill filed an application for post-conviction relief (PCR). The state filed a return on April 1, 2014. An evidentiary hearing was held on July 27, 2015 before the Honorable Thomas A. Russo. Hill was represented by Tristan Shaffer, and the state was represented by Joshua L. Thomas. App. 511.

At the PCR hearing, Hill's PCR attorney asked the court for a belated appeal pursuant to White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974) because the notice of appeal was filed one day late. The state did not object. App. 514, ll. 25 – App. 515, ll. 25.

Petitioner Hill testified that his trial attorney provided ineffective assistance of counsel because he did not investigate his case. Hill said his defense at trial was that he was not driving, and that his wife was "actually under the wheel when the traffic stop was initiated." Hill provided to trial counsel witnesses and where to contact them. And Hill wanted to know how he could retrieve his telephone and check "his itinerary and interview witnesses." Hill said law enforcement "posed" him behind the wheel of the car and took pictures. There was no forensic evidence indicating that Hill was driving. Blood and DNA were taken from the car and submitted to SLED but were returned "unanalyzed." App. 523, ll. 10 - App. 525, ll. 25.

Trial counsel testified that the trooper testified at trial that he saw Hill turn around and look at him from behind the driver's seat just before Hill sped away on the car chase. App. 548, ll. 1-25; App. 551, ll. 3 – 24. Trial counsel responded, when asked about witnesses Hill wanted interviewed, stated that Hill wanted counsel to speak with Hill's mother about her letting Sylvia have the car keys. Counsel said he went to the hospital and spoke with the mother but said: "She didn't really seem –I mean, she was conscious but didn't really seem very lucid and couldn't recall very much from the date that Sylvia had died." App. 555, ll. 24 – App. 556, ll. 12.

Then counsel admitted that Hill told him of some other people whom they had been with "preceding the auto chase." Counsel said he was unable to locate them. He could not remember any of their names. App. 556, ll. 13 – 16.

Emily Crayton testified at the PCR hearing that she was second seat on the trial, and got involved about three to four weeks before the trial. She said that Hill received a plea offer for twenty-two years on March 28, 2011. However, she stated that Hill "absolutely declined " and wanted to plead only to involuntary manslaughter. App. 571, ll. 1 – App. 572, ll. 20.

On October 7, 2015, Judge Russo issued an order granting Hill a belated direct appeal review pursuant to White v. State, id. The judge denied the PCR application otherwise and dismissed it with prejudice. App. 589 – App. 599.

The judge found that Hill failed to meet his burden of proof that trial counsel was ineffective for failing to investigate witnesses who potentially could have shown that the victim was driving the car. The judge found that Hill's testimony that his wife was driving the car when it "careened off the road," and that the police staged photos of him behind the wheel "wholly not credible." The judge wrote that the evidence indicated that Hill was driving because a tree limb that entered the passenger side of the windshield would have caused serious injury to the head

and neck of anyone in the passenger seat as were the injuries of Sylvia Hill. The judge found trial counsel's testimony credible that he attempted to investigate Hill's case by talking with witnesses, and so counsel's performance was "not deficient."

Hill's PCR attorney filed a timely notice of appeal. This petition follows accompanied by an Anders brief pursuant to White v. State, supra

ARGUMENT

1.

The PCR court correctly granted a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney filed the notice of appeal one day late.

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Hill's PCR attorney related at the PCR hearing that an appeal was not filed after Hill's trial, and that was one of the main issues he was raising in his PCR. His trial counsel missed the deadline by one day. App. 514, ll. 3 – App. 515, ll. 25; App.403; App. 403 – App. 406.

The PCR judge found that Hill did not knowingly and voluntarily waive his right to a direct appeal and granted Hill the right to a belated appeal according to White v. State, 263 S.C. 110, 108, S.E.2d 35 (1974). App. 591; App.599.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The order of the PCR court granting the belated appeal should be affirmed.

ARGUMENT

2.

The PCR court erred in not finding trial counsel ineffective for failing to investigate Petitioner's case timely and then asking for a continuance at trial in order to talk to witnesses who were significant to Petitioner's defense that he was not the driver as they observed the petitioner and his wife just prior to the incident, and trial counsel knew approximately six weeks earlier that the case was being called for trial that term.

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Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove 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 (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. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court found that trial counsel was ineffective because a criminal defense attorney has a duty to investigate, but this duty was limited to reasonable investigation. The Court defined a reasonable investigation at a minimum has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

The trial transcript disputes trial attorney's testimony at the PCR. At trial, Hill's defense was that he was not driving the Chevy Cobalt vehicle. App. 95, ll. 15 – App. 96, ll. 25. In a pretrial motion, defense counsel moved for a continuance in order for him to talk to witnesses who would testify in defense of Hill. One was his mother who was in a nursing facility but who was lucid as counsel said he did visit her and talk with her the day before trial. Counsel believed she was competent to testify. However, she needed more time to “convalesce” due to the physical condition in order to attend court. App. 76, ll. 6 – 23.

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Trial counsel was ineffective for waiting until just before trial to contact potential witnesses who could provide information about who was driving the Cobalt vehicle which was Hill's defense. Even if the witnesses could not say definitely who the driver was, they could likely provide information that could cause reasonable doubt as to the driver was-such as who had the car keys. The PCR court erred in not finding trial counsel ineffective for this reason.


In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court's denial of Lounds' PCR application and remanded for a new trial because trial

counsel was found to be ineffective for not adequately preparing for trial so as to be able to call key witnesses.

This was the situation in Hill's case in that his trial counsel was ill prepared for trial since he not talked to key witnesses sufficiently before trial.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded for a new trial on Issue 2. The order of the PCR court granting a belated appeal should be affirmed on Issue 1.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Darlington County

Honorable Thomas A. Russo, Circuit Court Judge

CHARLTON L. HILL,

PETITIONER,

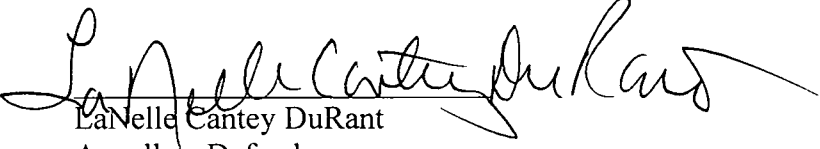
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

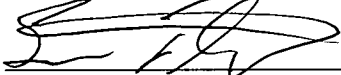
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Charlton L. Hill, #152778, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 17th day of August, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2016.



(L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.