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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
Court of Common Pleas
The Honorable Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015 – 002280
Lower Court Case No. 2014-CP-28-1207

Donnie R. Thigpen, #350243,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Did trial counsel provide ineffective assistance in derogation of Petitioner's Sixth and Fourteenth Amendment rights by failing to move to suppress Petitioner's incriminating statement to law enforcement based on the totality of the circumstances, including his level of intoxication.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Kershaw County. Petitioner was indicted at the March 2012 term of the Court of General Sessions for Kershaw County for Hit and Run – Death Result (2009-GS-28-1171) and Felony DUI – Death Result (2009-GS-28-1164). Applicant was represented by Alex T. Postic. Applicant proceeded to trial on March 23, 2012. He was convicted as indicted. The Honorable G. Thomas Cooper, Jr. sentenced Applicant to concurrent terms of ten (10) years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tommy A. Thomas, Esq. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Thigpen, No. 2014-UP-386 (filed November 5, 2014). The Remittitur was issued on November 21, 2013.

Petitioner filed his application for post-conviction relief (PCR) on December 30, 2014. (2014-CP-28-1207). (App. p. 1014-20). Respondent filed a Return on February 17, 2011. (App. p. 1021-25). A hearing was held on August 25, 2015. Petitioner was represented by Tommy A. Thomas, Esq. The State was represented by J. Clayton Mitchell of the South Carolina Attorney General's Office. An Order of Dismissal was issued by the Honorable Tanya A. Gee on October 11, 2015. (App. p. 1130-39).

A Petition for Writ of Certiorari was filed on August 4, 2016. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

An objection to the admission of Petitioner's statement on the grounds that he was too intoxicated to freely and voluntarily give a statement would not warrant suppression because evidence of intoxication goes to the weight, not admissibility.

Petitioner argues the PCR Court erred in finding that Petitioner failed to meet his burden in proving Counsel ineffective in failing to properly object to Petitioner's statement to law enforcement. Specifically, Petitioner argues Counsel was ineffective by failing to object based on the totality of the circumstances, including that he was too intoxicated to give a voluntary statement. Respondent submits Petitioner's statement was given voluntarily under the totality of the circumstances.

How The Issue Was Raised Below

Petitioner was convicted of Felony DUI and Hit and Run with a Death Resulting stemming from a single car accident involving his jeep where his friend, Melvin, was killed. (App. p. 202; p. 209-12). At trial, an extensive Jackson v. Denno hearing was held to determine the voluntariness of Petitioner's statements to law enforcement. (App. p. 86-146). At the Denno hearing, the State's witnesses testified to the following facts. Officers responded to the scene of the accident and determined that the vehicle belonged to Petitioner. (App. p. 212-13). Officers arrived at Petitioner's house between 11:00 am and 12:00 pm on June 20, 2009, to investigate the collision. (App. p. 93-95; p. 104). Petitioner had the odor of alcoholic beverage about his person and appeared to be intoxicated. (App. p. 94, lines 12-18). Officer Slaten read Petitioner his Miranda rights on the porch before speaking with him. (App. p. 94-95). Petitioner said he understood his rights, did not appear confused, and the police did not threaten or coerce him. (App. p. 95-97; p. 130). Petitioner agreed to talk to police; he denied any involvement in the collision. (App. p. 98; p. 130).

After determining that there was probable cause to arrest Petitioner for felony DUI, Trooper McKenzie took Petitioner into custody and placed him in his patrol car. (App. p. 102). The trooper Mirandized Petitioner again in the patrol car. (App. p. 102-103). Trooper McKenzie stated that Petitioner appeared to be under the influence when he spoke to him. (App. p. 105, lines 2-6). Petitioner continued to deny any involvement in the collision. (App. p. 105, lines 10-14).

Sergeant Coats, a member of the Multidisciplinary Accident Teams (M.A.I.T.), was called out to investigate the collision that day. (App. p. 109). After visiting the scene, he went to the jail to interview Petitioner. (App. p. 110). Sergeant Coats issued Petitioner his Miranda warnings before beginning the interview. (App. p. 110-11). The entire interview, which began at 5:20 pm and lasted approximately one hour and twenty minutes, was audio recorded. (App. p. 110-11; p. 113). Sergeant Borowski, who was also present at the interview, testified that, although he had observed Petitioner in an intoxicated state before noon that day, Petitioner had “sobered up a lot” by the time of the 5:20 pm interview. (App. p. 127-28; p. 131, lines 7-8). He testified that Petitioner’s condition had improved considerably. (App. p. 131, lines 5-7). Sergeant Borowski also testified that Petitioner understood what was going on at the time of the interview. (App. p. 127-29). Sergeant Coats agreed, stating that Petitioner was not threatened and that he had no reason to believe Petitioner was not acting of his own free will and accord. (App. p. 114-15). Sergeant Coats also testified that Petitioner could track the conversation they were having, was cognizant of what was going on, and understood everything that was said to him. (App. p. 116). Petitioner provided rational answers to questions, made arguments on his own behalf, and made corrections if incorrect information was relayed to him. (App. p. 112; p. 116; p. 130). During the interview, Petitioner provided an itinerary of his activities the night before the

collision and ultimately admitted that he had been driving the car at the time of the collision. (App. p. 114). He stated that he checked for the victim's pulse after the collision and found none. (App. p. 114, lines 9-10). Petitioner also stated that he "took full responsibility" for the collision. (App. p. 128, lines 19-21).

Following the pre-trial testimony of the four law enforcement officers, defense counsel stated he had no witnesses to present for the defense. (App. p. 133, lines 7-9). Counsel then reiterated his argument pursuant to State v. Kennedy¹. (See R. p. 133-35). As a part of this argument, he acknowledged that Petitioner, at the time of the 5:20 pm interview, was "understanding, his composition steadily improved, pretty good improvement from the beginning to the confinement when he is giving his statement and when he is at the detention center." (App. p. 133, lines 13-16). Counsel argued that, since Petitioner was "most cognizant of his rights" by the time of the 5:20 interview, he should have been given a complete Miranda warning. (App. p. 133, lines 17-22; p. 138-39). Counsel further acknowledged that the 5:20 interview was "clearly a different scenario" than the one earlier that day, and that it is clear that there is a "marked difference in the way [Petitioner] speaks and the way he answers those officers" at the 5:20 interview. (App. p. 134, lines 8-11; p. 135, lines 6-11). Counsel also stated Petitioner's "blood alcohol has gone down" and that his "ability to comprehend has gone up." (R. p. 134, lines 14-15). Counsel also asserted that Petitioner was promised leniency and help and told that he was facing up to fifty years in prison. (App. p. 135, lines 12-24).

The trial judge ultimately denied Petitioner's motion to suppress, finding that the Miranda warnings given to Petitioner before the 5:20 pm interview were appropriate. (See R. p. 136-46). Significantly, the trial judge pointed out that he had listened to the tape of Petitioner's

¹ State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998)

interview and did not find Petitioner's will was overborne or that his capacity for self-determination was critically impaired. (App. p. 137, lines 7-12). Subsequently, during trial, evidence regarding Petitioner's confession, including the audiotape of the interview, was admitted over defense counsel's objection. (See App. p. 321-22; p. 428-30; p. 433-34). Following his motion for directed verdict, defense counsel "renewed" his motion to suppress the confession. (See App. p. 700-709). After some discussion, the trial judge again denied the motion, pointing out that the confession was already in evidence and before the jury. (App. p. 709, lines 8-17). The trial judge later revisited the issue during the jury charge conference and reaffirmed his prior ruling with respect to State v. Kennedy. (See App. p. 824-30).

At the PCR hearing, Petitioner argued Counsel was ineffective for failing to properly object to the admissibility of Petitioner's statement where he admitted to driving the vehicle. Judge Gee denied relief and found Petitioner failed to meet his burden.

Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "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). With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but

for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Analysis

Petitioner's argument that Counsel was ineffective in failing to effectively challenge Petitioner's statement is without merit. First, Counsel made the strategic decision not to challenge the admission of Petitioner's statement on the ground that he was too intoxicated to have freely and voluntarily given the confession. Second, even if this argument had been made, the trial court would likely have denied the motion to suppress.

When determining whether or not a statement is voluntary, the trial judge must conduct an evidentiary hearing, outside the presence of the jury. State v. Simmons, 384 S.C. 145,162, 682 S.E.2d 19, 28 (Ct. App. 2009). During the evidentiary hearing, the State must prove the statement was voluntarily made by a preponderance of the evidence. Id. If the trial judge finds the statement voluntary and admissible, an appellate court will not reverse unless the decision was so erroneous as to demonstrate an abuse of discretion. Id. In other words, when reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead determines whether the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Here, Petitioner failed to meet his burden in proving Counsel was deficient in challenging the voluntariness of Petitioner's inculpatory statement. Counsel made the strategic decision to not challenge the statement on the grounds that Petitioner was too intoxicated to freely and voluntarily give the confession because the argument would have been meritless. Trial counsel cannot be found ineffective for failing to object to certain testimony where he articulates an

objectively reasonable strategy for not raising an objection. Rhodes v. State, 349 S.C. 25, 33, 561 S.E.2d 606, 610 (2002). As Counsel testified at the PCR hearing, he believed Saxon applied and that any challenge to the statement would be a challenge to the weight, not the admissibility. “The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words.” State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 113, 117 (1973). “Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused’s intoxication was such that he did not realize what he was saying.” Id. Proof of intoxication short of rendering the accused unconscious of what he is saying, ‘goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded by evidence.’ ” Id. (citing 29 Am.Jur (2d), Evidence, Section 577. Annotation: 69 A.L.R. (2 d) 361; 23 C.J.S. Criminal Law § 828, p. 229). Therefore, applying Saxon to the situation, it was reasonable for Counsel not to vigorously pursue the argument that Petitioner’s statement was given involuntarily because of his level of intoxication.

Petitioner asserts that this rule in Saxon was merely dicta. To the contrary, the issue before this Court in Saxon was whether the defendant had the mental capacity necessary to give a free and voluntarily statement despite his extreme intoxication. This Court held that proof of intoxication goes to the weight and not the admissibility of the statement. This rule goes directly to the issue and is therefore not dicta. This rule has been cited in other cases involving challenges to statements due to intoxication. See State v. Collins, 266 S.C. 566, 673, 225 S.E.2d 189, 193 (1976) (citing Saxon in ruling that the evidence regarding the defendant’s intoxicated condition at the time he made a statement to police “presented a factual situation which the judge determined unfavorably to the defendant. We cannot say he erred.”); State v. Morgan, 282 S.C.

409, 413, 319 S.E.2d 335, 337 (1984) (citing Saxon in ruling that the defendant's statement was voluntarily given even though he was intoxicated).

Even if this Court views the rule in Saxon as dicta, Petitioner failed to show under the totality of the circumstances that his statement was not freely and voluntarily made. Intoxication alone does not invalidate a knowing, intelligent, and voluntary waiver. In State v. White², the Court held that a suspect voluntarily waived his Miranda rights when he was in hospital bed on four point restraints and had been given sodium pentothal five hours prior to the questioning.. The officers did not question the suspect until after they had given him the Miranda warnings. White seemed to understand what he said to them and be aware of why the troopers were there. "The fact that he had been under medication and was strapped to his bed was, at best, only a circumstance the trial court was to consider in determining voluntariness." Id. at 294-295, 428 S.E.2d at 743; see also Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (holding coercive police activity is a necessary predicate to a finding that a confession is not voluntary, and a defendant's mental condition by itself and apart from official coercion does not dispose of the issue of voluntariness); People v. Veloz, 946 P.2d 525 (Colo.App.1997) (finding that intoxicated defendant who was stumbling around was properly advised of his rights and made statements voluntarily); State v. Tribou, 488 A.2d 472 (Me.1985) (although defendant had been drinking and smoking marijuana on the day of incident, he was not intoxicated and was able to understand and voluntarily to waive his rights); State v. Finson, 447 A.2d 788 (Me.1982) (even a person heavily intoxicated is not necessarily incapable of waiving constitutional rights.

Petitioner testified at the PCR hearing that he was aware of his surroundings, understood that the investigators were questioning him about the death of his friend and they believed he was driving the vehicle. (App. p. 1080-81). This evidence shows Petitioner's will was not

² 311 S.C. 289, 294-95, 428 S.E.2d 740, 743 (Ct. App. 1993)

overborne and that he understood the investigators questions and answered them with a specificity and awareness that demonstrated he gave the statement freely and voluntarily. Petitioner cites numerous cases from other jurisdictions finding a defendant's level of intoxication can render a confession involuntary. The majority of these cases share a common rationale in that the time between the defendant's alcohol consumption and the defendant's statement to investigators was minimal. See United States v. Cellemme, 431 F. Supp. 731 (D. Mass 1977) (where gap between time of consumption and giving of statement was approximately three hours); State v. Williams, 208 So.2d 172 (Miss. 1968) (approximately 3-4 hours); State v. Anderson, 78 N.W.2d 320 (Minn. 1956) (approximately 2 hours). Here, the accident sometime between 5:00a.m. and 9:00a.m. (App. p. 504). Petitioner was arrested at 11:29 a.m. (App. p. 334). He gave the confession beginning at 5:20 p.m. (App. p. 85-91). So, at least eight (8) hours had passed since Petitioner had consumed any alcohol. Furthermore, it is apparent from the record that Petitioner's level of intoxication decreased drastically by the time he gave the confession. (App. p. 112-16; p. 127-31; p. 320, lines 7-13). Notably, at the PCR hearing Petitioner failed to cite any other circumstances that would render his statement involuntary. Therefore, even if this argument was raised to the trial court, there is not a reasonable probability that the statement would have been suppressed.

Accordingly, Respondent submits the record fully supports the PCR court's reasonable findings in this regard.


CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 21, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
Court of Common Pleas
The Honorable Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015 – 002280
Lower Court Case No. 2014-CP-28-1207

Donnie R. Thigpen, #350243,

Petitioner,

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STATE OF SOUTH CAROLINA,

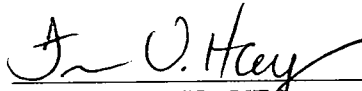
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 21st day of December, 2016



FELICIA V. HAYES
Legal Assistant For Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

DEC 21 2016

S.C. SUPREME COURT

December 21, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Donnie R. Thigpen, #350243 v. State of South Carolina**
Appellate Case No.: 2015-002280
Lower Court Case No.: 2014-CP-28-01207

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/fvh
Enclosures

cc: Susan B. Hackett, Esquire