ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable L. Casey Manning, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5448 (S.C. Ct. App. Filed 10/26/2016)

09-CP-40-00235

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-191687

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

INDEX i

CERTFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT 5

CONCLUSION 14

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 15, 2016.

QUESTION PRESENTED

Did the Court of Appeals err in reversing the PCR judge's grant of relief and finding that trial counsel was ineffective for failing to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person?

STATEMENT OF THE CASE

In March of 2002, the Richland County Grand Jury indicted Kranchick for two counts of felony DUI, one resulting in death the other resulting in great bodily injury, indictments #02-GS-40-894, 895. A first trial ended in a mistrial. On July 11, 2005, Kranchick proceeded to a second jury trial before the Honorable Reginald I. Lloyd. Attorneys Deborah Ahrens and Lauren Mobley represented Kranchick during the second trial. The jury found Kranchick guilty on both counts. Judge Lloyd sentenced Kranchick to 13 years for the count resulting in death, consecutive to a 12 year unrelated sentence she was already serving and 15 years consecutive suspended upon the service of 5 years of probation for the count resulting in great bodily injury. A timely notice of intent to appeal was filed and the direct appeal perfected on Kranchick's behalf. On October 17, 2008, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Kranchick, Op. No. UP-599 (S.C. Ct.App. filed October 17, 2008).

On January 14, 2009, Kranchick filed an application for post- conviction relief. The State filed a return on June 29, 2009. On June 14, 2010, an evidentiary hearing was held before the Honorable L. Casey Manning. Attorney Charlie J. Johnson represented Kranchick at the PCR hearing. In an order dated April 25, 2011, Judge Manning granted post- conviction relief. The State filed a timely notice of intent to appeal and on August 15, 2011, filed a petition for writ of certiorari. The return to the petition for writ of certiorari was filed on January 17, 2012. On December 30, 2013, the Court of Appeals granted the State's petition for writ of certiorari and requested briefing. On April 28, 2014, the State filed the brief of petitioner. This brief of respondent was filed on July 18, 2014.

On February 10, 2015, a three judge panel of the Court of Appeals heard oral argument in the case. On October 26, 2016, the Court of Appeals reversed the finding of the PCR court.

Kranchick v. State, 793 S.E.2d 314 (S.C. Ct. App. 2016). A timely petition for rehearing was filed and then denied on December 15, 2016. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in reversing the PCR judge's grant of relief and finding that trial counsel was ineffective for failing to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person.

In this felony DUI case that did not involve alcohol, trial counsel was ineffective in failing to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person. In the order granting relief the PCR judge wrote, "The toxicologist did not testify as to any education, experience, or knowledge related to the physical or mental effects of drugs on the human body. **Based on the record, the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs upon a person."** (App. pp 808-809) (emphasis in original). The PCR judge also wrote, "The toxicologist's testimony about the effects of marijuana or cold medicine on a person was beyond the scope of his expert qualifications, trial counsel's failure to object was ineffective assistance of counsel. The State did not present any additional evidence as to the effects of the marijuana or cold medicine. Trial counsel was deficient because trial counsel [sic] failure to object to this portion of the testimony clearly had prejudice effects on the out come of the trial." (App. p. 809).

At trial the State called as an expert witness in the field of forensic toxicology, Gregory Rock. Rock testified that he tested urine and blood samples from Petitioner Kranchick and detected the presence of marijuana metabolite, antihistamines and cough suppressant. (App. pp. 257-260). Kranchick tested negative for alcohol. (App. p. 257, line 21). The toxicologist testified about the effects the ingestion of marijuana and cold medicine would have upon a person. (App. pp. 267-270). The toxicologist testified that the amount of marijuana detected would impair someone's

ability to drive. (App. p. 265, lines 9-20). In regard to the antihistamine the toxicologist testified, "You would tend to have possibly hallucinogenic effects. You would have a sedative effect. You would have a very, muscle relaxing effect. Just a wide range of effects." (App. p. 267, lines 21-24). The toxicologist testified that the antihistamine detected would have impaired anybody's ability to drive. (App. p. 268, lines 10-13). The toxicologist gave similar testimony in regard to the cough suppressant. (App. p. 268, lines 18- p. 269, 270, lines 1-8). Finally, in regard to the combination of substances, the toxicologist testified, "Yes, she would have definitely been impaired." (App. p. 270, line 23). The effects testimony was beyond the scope of the expert's qualification. Trial counsel failed to object to the effects testimony.

The toxicologist was not qualified to testify about the effects of marijuana and cold medicine on a person because such testimony was beyond the scope of his stated expert qualifications. In State v. Priester, 301 S.C. 165, 391 S.E.2d 227 (1990), the South Carolina Supreme Court found that a lab technologist who admitted that he did not have any training in determining the effect of alcohol on the human system was not qualified to testify as to intoxication. While Rock was qualified as a forensic toxicologist, there is no evidence that he had training in determining the effect of marijuana and cold medicine on the human system.

The Court of Appeals correctly affirmed the PCR court's holding that trial counsel's failure to object to the testimony exceeding the toxicologist's "presented" qualifications fell below an objective standard of reasonableness. The Court of Appeals wrote:

> We find there is evidence in the record to support the PCR court's determination that "the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs on a person." See State v. Priester, 301 S.C. 165, 167, 391 S.E.2d 227, 228 (1990) (concluding the trial court erred in allowing a lab technologist, who admitted "he had no training whatsoever in determining the effect of alcohol upon the human system" to testify regarding the effects of drugs and alcohol); cf. State v. White, 311 S.C. 289, 295, 428 S.E.2d 740, 743 (Ct. App.1993) (concluding the trial court did not err in

> allowing the forensic toxicologist, who was qualified as an expert witness, to give an opinion concerning the effects of benzodiazepine when used in combination with alcohol after he admitted that different "benzos" have different effects and that he did not know which benzodiazepine the defendant had ingested). Thus, under our deferential standard of review, we affirm the PCR court's holding that trial counsel's failure to object to the testimony exceeding Rock's presented qualifications fell below an objective standard of reasonableness.

Kranchick v. State, 793 S.E.2d 314, 316–17 (S.C. Ct. App. 2016). The Court of Appeals, however, found that trial counsel's failure to object to the effects testimony did not prejudice the outcome of the case. The Court of Appels erred.

The PCR court correctly found that trial counsel's deficient performance prejudiced the outcome of the case. In the order granting relief the PCR judge wrote:

> Where there is limited admissible evidence on an element the State must prove, the failure of defense counsel to object to inadmissible evidence on that element is ineffective assistance of counsel. See Huggler v. State, 360 S.C. 627, 634-635, 602 S.E.2d 753, 757 (2004). To prevail on a claim for felony driving under the influence, one element the State must prove is that a defendant drove a vehicle while under the influence of alcohol or drugs. S.C. Code §56-5-2945 (2009). The State may prove this element by presenting evidence such that a reasonable jury could conclude that a defendant was intoxicated. In this case the State relied heavily on expert testimony that a defendant was intoxicated or would be intoxicated after ingesting a certain amount of alcohol or drugs. Therefore, Applicant has shown prejudice necessary to establish ineffective assistance of counsel.

(App. pp. 809-810). The PCR judge's finding of prejudice is wholly supported by the record.

Kranchick was prejudiced by trial counsel's failure to object to the toxicologist's testimony about the effects of marijuana and cold medicine. Kranchick went to trial for felony DUI. The South Carolina felony DUI statute, S.C. Code §56-5-2945 provides, "A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily

injury or death to a person other than himself, is guilty of the offense of felony driving under the influence . . ."

In order to prove felony DUI the State had to prove that Kranchick was under the influence. A critical issue for the jury to determine was if the presence of marijuana and cold medicine rendered Kranchick under the influence. The State carried the burden to prove and the jury had to determine whether, at the time of the accident, Kranchick was under the influence of marijuana and/ or cold medicine.

The State relied heavily on Rock's improper testimony to prove impairment, an element of felony DUI. The only effects evidence presented by the State was Rock's improper testimony. The State relied on the improper testimony in closing argument stating, "And I asked him [Rock] over and over again, and there's no dispute about this. Was her ability to drive have been impaired. Yes." (App. p. 617, lines 9-12). Kranchick was prejudiced by the improper testimony.

The Court of Appeals, however, finding no prejudice, wrote, "Although not specifically presented, Rock's education and experience are equivalent to the qualifications of the Martin forensic toxicologist." Kranchick v. State, 793 S.E.2d 314, 319 (S.C. Ct. App. 2016). In State v. Martin, 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011), the forensic toxicologist explained the extent of his training and education regarding the effects of alcohol and drugs on the body. Based on Martin the Court of Appeals wrote, "Thus, it is likely that objections to Rock's further testimony concerning effects of the drugs would have been futile because the objections would have addressed the weight of the evidence, rather than its admissibility." Id.

The finding by the Court of Appeals that any objection to Rock's effect testimony would have been futile because it goes to weight and not admissibility **assumes** that Rock's education and

experience are equivalent to the qualifications of the forensic toxicologist in Martin. The finding **assumes** the State would have been able to establish that Rock was qualified to testify as to effects. Rock's effects testimony was inadmissible because, as the Court of Appeals correctly found, the testimony exceeded the scope of his expert qualification. Reliance on Martin is misplaced because at trial the State in the present case failed to establish that Rock was qualified to testify as to the effect of marijuana and cough medicine on the body. In the present case there was no testimony regarding Rock's training and education regarding the effects of marijuana and cold medicine on the body. Unlike the forensic toxicologist in Martin, Rock was only qualified to testify about the presence or absence of substances, not the effects. At trial he testified that, "A forensic toxicologist is a person or scientist who analyzes biological specimens for the presence or absence of alcohol, drugs or other poisons that may be present." (App. p. 250, lines 9-11).

Reliance on State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct.App. 1993), is misplaced because the toxicologist in White was qualified to testify as to effects and the objection went to the fact that the toxicologist did not know which benzodiazepine White had taken. The Court in White found that the objection went to the weight and not the admissibility of the testimony. In contrast, in the present case, Rock was not qualified to testify as to the effects of marijuana and cold medicine. Trial counsel should have objected when Rock's testimony exceeded the scope of his qualification.

In conclusion the Court of Appeals wrote, "Because we find Rock's qualifications are equivalent to those of the forensic toxicologist in State v. Martin supra, his testimony regarding the effects of marijuana metabolite and cold medicine would have been appropriate and within the scope of his expertise. Therefore, we hold the PCR court erred in determining that "but for counsel's unprofessional errors," the result of Kranchick's trial would have been different."

Kranchick v. State, 793 S.E.2d 314, 320 (S.C. Ct. App. 2016). As discussed above, the record in the present case is devoid of any evidence or testimony that Rock was qualified to testify about the effects of marijuana and cold medicine. Rather than deferring to the finding of prejudice by the PCR court, the Court of Appeals speculated, without any basis in the record, that Rock had the equivalent qualification as the forensic toxicologist in Martin. The mere fact that two witnesses in separate cases shared the title of "forensic toxicologist" is not sufficient to assume that they had equivalent qualifications in regard to effects testimony. There is no evidence in the record to support the assumption that Rock would have been found qualified to testify about the effects of cold medicine and marijuana had trial counsel objected. Because the State failed to establish that Rock was qualified to testify in regard to the effects of marijuana and cold medicine, Rock's qualification was the same as the lab technologist in State v. Preister, 301 S.C. 165, 391 S.E.2d 227 (1990), who admitted that he had no training in determining the effect of alcohol on the human system. In Priester this Court found the technologist was not qualified to testify as to intoxication and the admission of his testimony constituted reversible error in that felony DUI case. This Court should find, as the PCR court found, that Rock was not qualified to testify as to the effects of marijuana and cold medicine and that trial counsel's failure to object prejudiced Petitioner.

Another important distinction between the present case and Martin is the fact that in Martin the State was entitled to an inference that Martin was under the influence of alcohol, making any error in admitting effects testimony harmless. "Finally, even if the trial court erred in allowing Landrum's testimony regarding the effects of drugs and alcohol, Martin was not prejudiced. The State was entitled to an inference Martin was under the influence of alcohol because his BAC was 0.167 percent. *See* S.C.Code Ann. § 56–5–2950(G)(3) (Supp.2009) (providing that in a criminal prosecution for felony DUI, a blood alcohol concentration of greater than 0.08 gives rise

to an inference the defendant was under the influence of alcohol)." State v. Martin, 391 S.C. 508, 515, 706 S.E.2d 40, 43 (Ct. App. 2011). In the present trial counsel was ineffective in failing to object to Rock's effects testimony that exceeded the scope of his expert qualification. The error was not harmless as the State was not entitled to the blood alcohol inference in Martin. Kranchick tested negative for alcohol. (App. p. 257, line 21).

The Court of Appeals additionally wrote, "Moreover, even if trial counsel had successfully objected, thus limiting Rock's testimony to the mere presence of the drugs found in the blood testing, Kranchick cannot establish the probability of a different result at trial." Kranchick v. State, 793 S.E.2d 314, 319 (S.C. Ct. App. 2016). The Court of Appeals overlooked the strength of Rock's improper effects testimony. Again, as correctly noted by the PCR judge:

> Where there is limited admissible evidence on an element the State must prove, the failure of defense counsel to object to inadmissible evidence on that element is ineffective assistance of counsel. See Huggler v. State, 360 S.C. 627, 634-635, 602 S.E.2d 753, 757 (2004). To prevail on a claim for felony driving under the influence, one element the State must prove is that a defendant drove a vehicle while under the influence of alcohol or drugs. S.C. Code §56-5-2945 (2009). The State may prove this element by presenting evidence such that a reasonable jury could conclude that a defendant was intoxicated. In this case the State relied heavily on expert testimony that a defendant was intoxicated or would be intoxicated after ingesting a certain amount of alcohol or drugs. Therefore, Applicant has shown the prejudice necessary to establish ineffective assistance of counsel.

(App. pp. 809-810). As found by the PCR judge, there is a reasonable probability that, but for counsel's failure to object to the improper effects testimony, the result of the proceeding would have been different.

The Court of Appeals additionally found there was no prejudice based on other evidence of impairment. The other evidence presented by the State as to whether Kranchick was under the

influence at the time of the accident was not overwhelming. The toxicologist testified about detecting the presence of marijuana metabolite and cold medicine but admitted that the marijuana could have been smoked up to 24 hours prior to testing. (App. p. 277, lines 11-21). S.C. Highway Patrol Officer Baker testified that based on his observations of Kranchick, he believed she was under the influence. (App. p. 177, lines 18 – p. 178, lines 1-6; p. 196, lines 18-20). The State's evidence, however, does not constitute overwhelming evidence rendering counsel's failure to object to the toxicologist's improper testimony non-prejudicial. This is especially in true in light of witness Pasante Trapp's testimony that prior to the accident another passenger in the car jerked/snatched the steering wheel, which support the argument that the accident was caused by something other than impairment . (App. pp. 495-502). The toxicologist's effects testimony was critical and Kranchick was prejudiced by trial counsel's failure to object to the improper testimony. There is a reasonable probability that, but for counsel's failure to object to Rock's improper testimony, the result of the proceeding would have been different.

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.

In Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014), this Court wrote:

> The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). The PCR court's findings on matters of credibility are given great deference by this Court. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

Petitioner Kranchick met her burden of establishing both ineffective assistance of counsel and resulting prejudice. There is ample evidence of probative value to support the finding of the PCR judge with regard to ineffective assistance of counsel and resulting prejudice and those findings are not controlled by an error of law. Based on the "any evidence standard," this Court should uphold the findings by the PCR judge and reverse the finding by the Court of Appeals.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari, reverse the decision by the Court of Appeals, affirm the grant of relief by the PCR Court and remand for a new trial.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of January, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Honorable L. Casey Manning, Circuit Court Judge

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09-CP-40-00235

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shanna Kranchick, #283147, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 11th day of January, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.