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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post-Conviction Relief
Brooks P. Goldsmith, - Presiding Judge

Case No.: 2016-002253

Gregory Velez #345428Petitioner,

vs.

State of South CarolinaRespondent.

PETITION FOR WRIT OF CERTIORI

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Cherry v. State, 300 S.C. 117, 386 S.E. 2d 625 (1989)

Davis v. Alaska, 415 US 308, 49 S.C. 1105, 39 L. Ed 2d 347 (1974)

State v. Brewington, 267 SC 97, 226 S.E. 2d 249 (1976)

State v. Brown, 303 SC 169, 399 S.E. 2d 593 (1991)

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)

South Carolina Code of Law

South Carolina Rule of Evidence 608 (c)

QUESTION PRESENTED

1. **Did the PCR Court err in dismissing the Appellant's Post-Conviction Relief Action on the basis that trial counsel was not ineffective in his failure to cross-examine the witness Jeremy Leaphart about his plea and the fact that he was threatened by the Solicitor to add five (5) years to his sentence if he did not testify?**

2. **Did the PCR Court err in dismissing the Petitioner's Post Conviction Relief action in not finding that counsel was ineffective for admitting a letter from Co-Defendant Jeremy Leaphart as evidence at trial? That in admitting this letter Counsel opened the door for the admission of a reply letter from the Petitioner. This error prejudiced the Petitioner and also allowed the State to have the last argument at closing.**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Petitioner was indicted at the November 2008 term of the Lexington County Grand Jury for burglary, first-degree (2008-GS-32-3721), kidnapping (2008-GS-32-3722), criminal conspiracy (2008-GS-32-3724), robbery/armed robbery (2008-GS-32-3725), and possession of a weapon during a violent crime (2008-GS-32-3726). Petitioner was represented by W. Michael Duncan, Esq. On March 28, 2011, the State called this case to trial. The jury found Petitioner guilty as indicted. The Honorable R. Knox McMahon sentenced Petitioner to twenty-five years in prison for kidnapping, five years for criminal conspiracy, twenty-five years for armed robbery and five years for the firearms provision. The sentences were to be served concurrently.

A Notice of Appeal was filed and perfected by Katherine Hudgins, Esq., of the Office of Appellate Defense pursuant to Anders. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences by unpublished opinion. State v. Gregory Velez, 2013-UP-045 (S.C. Ct. App. filed January 30, 2013). The Remittitur was issued on February 21, 2013.

STATEMENT OF THE FACTS

On April 9, 2013 Petitioner filed an Application for Post-Conviction Relief (2013-CP-32-1230) which was amended on May 7, 2015. Respondent made its return on or about December 23, 2013. An evidentiary hearing was held on June 9, 2015, at the Lexington County Courthouse. An Order of Dismissal was filed on October 28, 2016.

Applicant, Applicant's co-defendant, Mr. Leaphart, represented by Anna Good, Esq.; and Applicant's trial counsel, Mike Duncan, Esq. testified at the hearing. The Court had before it Applicant's trial transcript, the Lexington County Clerk of Court records, the South Carolina

Department of Corrections records, the PCR application, the Return, the State's exhibit ("Duncan Timesheet") and the following Applicant exhibits: (1) plea agreement/offer, (2) audio statements of conspirators, (3) a letter written from Mr. Leaphart to Applicant, known as the "Leaphart Letter"; (4) a letter written from Applicant to Mr. Leaphart, known as the "Velez Letter"; (5) a statement by one of the victims, Mr. Corley; (6) the CAD Report; (7) the incident report in the underlying case; and (8) the search warrant in the underlying case.

On August 13, 2008 a home located on 521 Howard Street, in Batesburg, South Carolina was entered into by masked individuals. The residents in the home were tied up and money in the amount of \$1416.00 was taken. This money was located in an empty water container. One of the victims was struck by a pistol requiring medical treatment. None of the victims were able to identify the intruders, nor was a vehicle identified at the scene. The victims of the crime indicated that the intruders had taken efforts to conceal their identity.

A short time after the incident, police discovered a black SUV bearing South Carolina license plate 564XJL parked on the left shoulder of the road in the general proximity of where the robbery had taken place. They stopped and noticed an individual approaching the vehicle with what appeared to be a weapon. After the officer drew his pistol and commanded this person to stop, he turned and ran back into the woods. Four individuals were arrested, including the Petitioner. A search of the car revealed certain evidence incriminating and indicative of involvement in the Robbery. The vehicle was taken into possession by the Police Department and later on August 14, 2008, a search warrant was issued. The contents of the vehicle were itemized which included the driver's license of the Petitioner, approximately \$1200.00 to \$1600.00 in cash in a large water container, as well as other items.

Statements were initially given by all the Defendant's denying that they had any involvement in the alleged robbery. Eventually three of the Co-Defendant's pled guilty. Petitioner did not plead guilty and proceeded to trial.

This Appeal follows:

ARGUMENT 1

Did the PCR Court err in dismissing the Appellant's Post-Conviction Relief Action on the basis that trial counsel was not ineffective in his failure to cross-examine the witness Jeremy Leaphart about his plea and the fact that he was threatened by the Solicitor to add five (5) years to his sentence if he did not testify?

The Petitioner testified at his PCR hearing that he believed that his Defense Counsel failed to properly cross examine his co-defendants. (App. p. 503, lines 13-23) The Petitioner was notified by Co-Defendant, Jeremy Leaphart, before his trial that Mr. Leaphart wished to speak with him. The Solicitor, allowed the Petitioner to go in the back room and speak with Mr. Leaphart and his attorney. Petitioner testified that he asked Mr. Leaphart, "Why are you doing this to me, you have gotten your time already, why are you coming back." Mr. Leaphart stated that he was going to have to testify against him and that they were going to give him five (5) extra years if he didn't testify. (App. p. 17, lines 2-9) His Defense attorney was present for this conversation and Petitioner believes that his Defense Counsel should have used this information in cross examination of Mr. Leaphart. (App. p. 17, lines 14-24)

Mr. Jeremy Leaphart was transported to the Post Conviction Relief hearing. He testified that he received a ten (10) year sentence for Burglary 2nd Degree and Attempted Armed Robbery (App. p. 531, lines 21-24). At the Post Conviction Relief hearing, Mr. Leaphart was represented by counsel and advised of the potential danger of testifying. Mr. Leaphart, however, verified that the Solicitor allowed him to speak with Petitioner and that he asked the Petitioner to take the plea because he really didn't want to go to trial. (App.p. 534, lines 17-23) Mr. Leaphart further

testified that the Solicitor told him that if he didn't testify "we are going to take your guilty plea back and give you five (5) more years". (App. p. 535, lines 8-10) Mr. Leaphart stated that the Petitioner's Defense Attorney was present at this time and that he did ultimately testify at trial. When asked, why did you testify, he stated "I was under the impression that "I aint got no choice, if I don't they were going to take my time back and at this time I had been locked up for three or four years." (App. p. 535, lines 17-19) Mr. Leaphart also testified, when asked did he testify truthfully at the trial, he said "no, I testified what Casey and Ms. Angela told me to say." (App. p. 536, lines 2-4)

Defense Counsel W. Michael Duncan testified at the Post Conviction Relief hearing if there was anything said during this meeting that he could have or should have used in cross examination of Mr. Leaphart. He indicated "I thought I used what could be used to cross examine." (App. p. 549, lines 4-6) Defense Counsel further stated that this obviously is a very significant point, referring to Mr. Leaphart's testimony about them taking back his time and giving him more time. (App. p. 549, lines 7-9) He concluded by saying that this was four years ago. I think I would have remembered that if this statement had been made as explicitly as Mr. Leaphart testified to. He remembered Mr. Leaphart trying to convince the Petitioner to plead guilty because Mr. Leaphart didn't want to testify against him. (App. p. 549, lines 11-19)

This Court has found that a Defendant has a right to cross examine a witness concerning bias under the confrontation clause. Davis v. Alaska, 415 US 308, 49 S.C. 1105, 39 L. Ed 2d 347 (1974) and State v. Brown, 303 SC 169, 399 S.E. 2d 593 (1991). The Court has gone further to state that on cross examination, any fact may be elicited which tends to show interest, bias, partiality of the witness. State v. Brewington, 267 SC 97, 226 S.E. 2d 249 (1976). In addition, Rule 608 (c) of South Carolina Rules of Evidence states that bias, prejudice or any

motive to misrepresent may be shown to impeach the witness, either by examination of the witness or by evidence otherwise induced.

While the case at hand is not a direct example of a confrontation clause issue, it does bring out the intent and protection offered by the confrontation clause. That it would be incumbent upon counsel to bring out any bias, prejudice or any motive of misrepresentation that he can show. In this situation, Trial Counsel met with his client and the witness, Mr. Leaphart. He knew that Mr. Leaphart was going to testify against his client and he knew that there was a motive that had been expressed to him by the witness. This motive being that unless he made a statement against the Petitioner, that his plea was going to be annulled and he was going to be given an additional five years to his sentence. The Petitioner would contend that this issue is highlighted the fact that the witness, Mr. Leaphart, actually attending the Post Conviction Relief hearing and stated the facts that he had met with both Trial Counsel and Petitioner prior to his trial. That he was there at Court to testify that the Petitioner was not involved in this matter and that the purpose of being there was because he had been feeling guilty for a long time and wanted to tell the truth.

Trial counsel was in fact ineffective for his failure to cross examine witness, Leaphart. Having the knowledge that Leaphart had been forced to testify by the State. The Court erred in not granting Post-Conviction Relief based upon the fact that the witness, Mr. Leaphart, was present before the Court to recant the testimony and to bring to the attention of the Court that he felt that he had been forced to lie.

ARGUMENT 2

Did the PCR Court err in dismissing the Petitioner's Post Conviction Relief action in not finding that counsel was ineffective for admitting a letter from Co-Defendant Jeremy Leaphart as evidence at trial? That in admitting this letter Counsel opened the door for the admission of a reply letter from the Petitioner. This error prejudiced the Petitioner and also allowed the State to have the last argument at closing.

Counsel entered at Trial, Plaintiff's exhibit No. 3, which was identified as a personal letter from Jeremy Leaphart to the Petitioner. The letter from Mr. Leaphart was introduced by Defense Counsel, which then opened the door for the introduction of a letter from the Petitioner by the Solicitor.

The Petitioner was asked on the stand if he believed the entry of the exhibit, being the letter from Mr. Leaphart and his letter, were beneficial to his case. He stated "absolutely not." He did not recall discussing with his Defense Counsel the entering of the letter as an Exhibit at trial (App. 10, lines 4-19) and felt the two letters together could lead the Jury to believe that they were in collusion.

The Petitioner testified that Defense Counsel had Mr. Leaphart read the letter on the stand and it triggered the State to come with a re-cross and show him a letter, that the Petitioner supposedly wrote. (App. p. 511, lines 5-7) The letters painted a picture that he and Mr. Leaphart were trying to help each other or something of that nature. He was also concerned that his letter, which was introduced by the Solicitor, was not authenticated and that no steps were taken to identify the letter as coming from the Petitioner. (App. p. 511, lines 8-13)

Trial Counsel at the Post Conviction Relief hearing entered Exhibit No. 4, which is the letter that the Petitioner had written to Mr. Leaphart. The Petitioner further testified that the only reason that the Solicitor brought this letter up was because of the actions of his attorney. He

understood that his Defense Counsel opened the door for the Solicitor to be able to introduce the letter. (App. p. 512, lines 7-10)

The Appellant did not testify at Trial and he stated at the PCR trial, that Defense Counsel's introduction of the letter prevented his attorney from having the last closing argument and believed that this seriously impacted him. (App. p. 513, lines 9-13)

Trial Counsel testified that he specifically recalled entering the hand written letter from Mr. Leaphart at trial. (App. p. 551, line1) Counsel was asked were you aware that introducing the letter written by Mr. Leaphart opened the door for the State to introduce the letter from Mr. Velez, in which Counsel responded, yes. (App. p. 553, lines 9-13)

Trial Counsel stated that he thought that the introduction of the letters was more helpful or neutral (App. p. 553, lines 24-25)

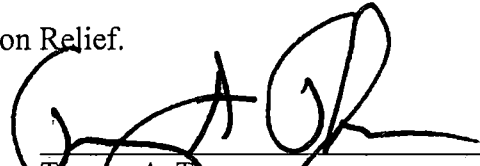
Under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) and Cherry v. State, 300 S.C. 117, 386 S.E. 2d 625 (1989), the proper measure of performance is whether an attorney provides representation with a range of competency required in criminal cases as well as counsel's conduct, must undermine the proper functioning of the adversary process or the trial cannot be relied upon as having produced a just result. Counsel's deficient performance must prejudice the Applicant such that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.

In this case, counsel introduced a letter from the Co-Defendant, Leaphart in an attempt to show that he had made the statement that the Petitioner was not present during the commission of the crime. This decision allowed the State to then introduce a letter from the Petitioner which appeared to be an attempt distance Mr. Leaphart from the crime. In making this decision, it

opened the door for the State to introduce an unauthenticated letter from Petitioner on a redirect examination. This severely prejudiced the Petitioner. In addition, the Petitioner did not testify at Trial and this allowed the State to have the last argument in that the defense had presented evidence in the case.

CONCLUSION

Therefore, based upon the foregoing arguments the Petitioner respectfully requests that the Court grant the Petitioner's request for Post-Conviction Relief.



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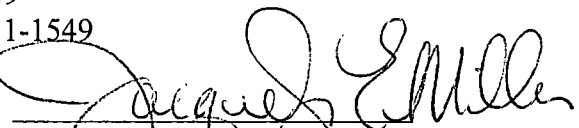
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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the
Petitioner hereby certify that I placed in the United States Mail, a copy of a Petition for
Writ of Certiorari and Appendix, with postage prepaid and the return address clearly
shown on said envelope to:

Jessica Kinard, Esq.
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