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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Maite Murphy, Circuit Court Judge

LONDON DEVONTA WOODEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000809

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. **Did the PCR Court err in finding that Petitioner did not prove prejudice regarding trial counsel opening the door to prior bad acts, where one of the State's witnesses was allowed to testify about Petitioner allegedly punching her only after counsel opened the door to the prior bad act?**

II. **Did the PCR Court err in finding that Petitioner's guilty plea was entered into voluntarily, where Petitioner had just been convicted of murder and thereby did not believe counsel could provide effective representation at a subsequent trial?**

III. **Did the PCR Court err in finding that trial counsel received effective assistance of counsel, where counsel failed to prepare for trial, failed to communicate a defense strategy with Petitioner, and repeatedly suggested that Petitioner plead guilty?**

STATEMENT

Petitioner allegedly shot David Maple on the night of October 1, 2011. App. 52 ll. 15 – 19; App. 59 ll. 21 – 24; App. 72 ll. 1 – 14. Two eyewitnesses claimed to have seen Petitioner pull a gun from his pants and shoot Maple while the two were engaged in conversation. App. 74 ll. 18 – 25; App. 75 ll. 7 – 18; App. 261 l. 1 – 263 l. 23. Maple was placed in a car and driven to the hospital. App. 89 l. 18 – 90 l. 1. He subsequently passed away. App. 224 ll. 8 – 11.

An eyewitness, Schantrika Carter, called 911 and spoke with officers when they arrived. App. 90 l. 21 – 93 l. 12. Carter provided a statement to police and indicated where the gun had been dropped. Id. Andrew Busbee, an Aiken County Sheriff, responded to the scene and located Petitioner based upon a description given by Carter. App. 167 l. 2 – 168 l. 24. Busbee took Petitioner to his patrol car and left him there all night. Id. Carter identified Petitioner while he was in the back of the police car. App. 92 l. 20 – 93 l. 4.

Petitioner was indicted for murder and possession of a firearm during the commission of a violent crime by an Aiken County Grand Jury during its April 2012 term of court. App. 716 – 719. On November 12, 2013, Petitioner proceeded to a three-day trial before the Honorable James R. Barber, III and a jury. App. 1. Elizabeth A. Young and Samuel B. Grimes represented the State. D. Grant Gibbons and Andrew Smith represented Petitioner.

At the conclusion of trial, the jury found Petitioner guilty as indicted. App. 591 l. 20 – 592 l. 12. The following morning, Judge Barber sentenced Petitioner and accepted Petitioner's guilty plea to a burglary in the first degree charge. App. 594 l. 23 – 602 l. 11. The State offered the following facts regarding the burglary:

On August 1, 2011, Anthony Berry contacted law enforcement about a burglary at his home. App. 602 l. 14 – 604 l. 1. A side window had been broken and blood was located on the

window frame. Id. Blood collected at the scene was submitted to SLED, and CODIS matched the DNA profile developed from the blood to Petitioner. Id.

Petitioner was sentenced to thirty-five years' incarceration on the murder charge, thirty-five years on the burglary charge, and five years on the possession of a weapon charge. App. 609 ll. 8 – 19. The sentences were crafted to run concurrently. Id.

Petitioner filed an application for post-conviction relief. App. 611. He alleged ineffective assistance of counsel and claimed that his guilty plea was entered involuntarily. App. 613. The State filed a Return and Partial Motion to Dismiss on or about August 27, 2015. App. 618. Petitioner twice subsequently amended his application for post-conviction relief, adding claims that counsel failed to discuss and put forth a defense, opened the door to prior bad acts, failed to adequately cross-examine the State's DNA expert, and failed to challenge the reliability of the DNA expert. App. 625 – 627.

In December 2016, a Consent Order signed by the Honorable Diane S. Goodstein was filed. App. 629. The State's partial motion to dismiss was denied, and it was ordered that Petitioner should receive a PCR hearing on both the trial and plea convictions. App. 631.

An evidentiary hearing was conducted before the Honorable Maite Murphy on January 23, 2017. App. 633. Lance Boozer represented Petitioner, and Julie Coleman represented the State. Petitioner and trial counsel testified at the hearing.

An Order of Dismissal was issued on March 13, 2017 and filed on March 27, 2017. App. 705. The PCR judge dismissed Petitioner's application based upon a finding that each claim was meritless and that Petitioner failed to prove prejudice. App. 712 – 714.

This Petition follows.

ARGUMENT

I. The PCR Court erred in finding that Petitioner did not prove prejudice regarding trial counsel opening the door to prior bad acts, where one of the State's witnesses was allowed to testify about Petitioner allegedly punching her only after counsel opened the door to the prior bad act.

During cross-examination of one of the State's witnesses, Counsel Smith opened the door to a prior bad act allegedly committed by Petitioner. The following exchange took place between counsel and the witness, Erica Richardson:

Q: You don't like [Petitioner], do you?

A: I don't have no issue with him.

Q: Didn't you try to press charges against him about a month or two before this happened?

A: Yes, sir, I did.

Q: Okay. But you don't have anything against him?

A: No, sir, I don't.

App. 321 ll. 7 – 13.

During the subsequent re-direct by the prosecution, Richardson gave a detailed explanation about an alleged prior act supposedly involving Petitioner after the trial court ruled that counsel "opened the door on that." App. 322 ll. 13 – 21. Richardson testified as follows:

> It was an incident - - I guess he like tried to want to have intercourse with me and he blocked my car in there. I never even gave him any reason to even try to have a crush on me or anything and I was going to see my guy friend and his friends blocked my car in when I was dropping people off at Ms. Mary's house. And he jumped in my car, in my back seat, and he told me - - I kept telling him to get out my car because I was going to see my guy friend and he told me he was not going to get out of my car unless me or Candice gave him sex. He stayed in my car for

> at least 45 minutes. I kept telling everyone to get him out of my car. They thought it was a joke. He laid in the back seat of my car.
>
> So I just got out of my car and when I got out my car and I started - - I did. I started trying to pull him out of my car and he was like, Man, if you pull me again, I'm going to knock you out. So I said forget it. So once I got out of the car and fixes to walk away, he turned and punched me. I got the scar right there to prove it and he knocked me out cold.
>
> ...
>
> I called the police. At the time he was 16. The police came. I went to the ambulance - - I went to the hospital and got stitches. He told the police to lock him up because he did it, but at the time they could not lock him up because he was under age, so an investigator - - I missed work and everything. The investigator, they came along and she was pursuing with the case and the case was going to take place but that's when this case happened to David Maple.

App. 322 l. 24 – 324 l. 3.

Richardson indicated that this incident occurred a couple of weeks prior to the events giving rise to Petitioner's charges. App. 324 ll. 4 – 6. Richardson reminded the jury a second time that she had to get stitches in her mouth and still had the scar to prove it. App. 324 ll. 7 – 8.

Petitioner did not have a lot of interaction with Counsel Smith. App. 650 ll. 14 – 16. Had counsel not opened the door by asking Richardson about pressing charges against Petitioner in an unrelated incident, testimony regarding that incident would not have been before the jury. App. 652 l. 24 – 653 l. 2. Petitioner indicated that the testimony prejudiced his case. App. 653 ll. 3 – 5.

Counsel Gibbons agreed that the above allegations were "pretty serious" and admitted that prior bad acts would not typically be brought to light unless discussed by defense counsel. App. 680 ll. 9 – 24. Counsel suggested that it was Petitioner's fault for not offering more information regarding the prior incident. App. 680 l. 20 – 681 l. 12. Counsel admitted that he

should have been more prudent and asked Petitioner for a detailed explanation of the prior incident. App. 681 ll. 13 – 18.

Petitioner correctly asserted that trial counsel was ineffective, because counsel opened the door to a prior bad act which would not have been discussed but for counsel's mistake. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. "'[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, supra). In this regard, trial counsel opened the door to an otherwise irrelevant incident and therefore allowed the jury to hear about an alleged prior bad act involving Petitioner. Such conduct falls within the gamut of deficiency; the witness would not have been allowed to even mention the prior bad act unless the door was opened.

"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that 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. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In this regard, there is a strong likelihood that the jury would have reached a different verdict but for this damaging testimony which painted Petitioner in a bad light. The prior incident was otherwise irrelevant, and allowing the jury to hear details regarding Petitioner allegedly punching a witness prejudiced him at trial.

II. The PCR Court erred in finding that Petitioner's guilty plea was entered into voluntarily, where Petitioner had just been convicted of murder and thereby did not believe counsel could provide effective representation at a subsequent trial.

After losing his trial and being convicted by a jury, Petitioner felt as if counsel could have done a better job. App. 655 ll. 7 – 13. He lost faith in counsel and did not believe that "counsel would have [provided] the proper representation for a trial [involving Petitioner's] burglary case." Id. In fact, Petitioner did not want to plead guilty. App. 655 ll. 14 – 18.

Counsel believed Petitioner to be in shock following the trial and immediately before the guilty plea. App. 689 l. 10 – 690 l. 10; App. 690 ll. 23 – 25. Counsel could not remember the amount of time that passed between the conclusion of trial and the beginning of the guilty plea and stated that it could have been half an hour. App. 690 ll. 14 – 22.

When asked why he did not inform the plea judge that he was unhappy with his attorneys, Petitioner confessed that he was scared. App. 664 ll. 3 – 5. Although Petitioner admitted that nobody was threatening or promising him anything in order to plead guilty, that part of the plea colloquy fails to take into account the ramifications of having just been sentenced to thirty-five years' incarceration at the South Carolina Department of Corrections. App. 664 ll.

3 – 9. At the time of his evidentiary hearing, Petitioner testified that he wanted a trial on the burglary charge. App. 664 ll. 13 – 14.

Petitioner and trial counsel "barely discussed the burglary charge." App. 665 ll. 9 – 13. Trial counsel's main focus was the murder charge. Id. When asked what led to the plea, Petitioner testified: "My counsel advised me what if I didn't plead to the burglary I would sustain a life sentence." App. 665 ll. 14 – 22.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

Petitioner's testimony during the PCR, coupled with counsel's admission that Petitioner was in shock, suggest that Petitioner was not thinking clearly when he chose to plead guilty. Petitioner indicated that he did not trust his attorneys to provide competent representation at a second trial, and he felt as if he had no choice but to plead guilty. Therefore, his plea was entered neither freely nor voluntarily.

III. The PCR Court erred in finding that trial counsel received effective assistance of counsel, where counsel failed to prepare for trial, failed to communicate a defense strategy with Petitioner, and repeatedly suggested that Petitioner plead guilty.

Grant Gibbons and Andrew Smith were appointed to represent Petitioner. App. 640 l. 11 – 641 l. 1. Gibbons had more contact with Petitioner than Smith did. App. 668 ll. 13 – 15. Petitioner was arrested on or about October 1, 2011. App. 641 ll. 6 – 7. Between the time that Gibbons was appointed and the time of Petitioner's trial, Petitioner could not recall the number of times that Gibbons visited him. App. 641 ll. 18 – 22.

About one year into his incarceration at the jail, Petitioner asked counsel about a preliminary hearing. App. 642 ll. 6 – 14. Instead of requesting a preliminary hearing, counsel moved for a speedy trial, and Petitioner never received a preliminary hearing. App. 641 l. 23 – 642 l. 14. It does not appear counsel advised Petitioner that moving for a speedy trial would result in the waiver of a preliminary hearing. App. 642 ll. 6 – 14.

Petitioner did not become aware of his trial until the weekend before it occurred. App. 644 ll. 8 – 17. Petitioner did not recall having a discussion with counsel regarding the witnesses who would be called on his behalf. App. 645 ll. 6 – 9.

During pre-trial preparation, Petitioner and counsel "would discuss the case, the evidence, [and] the witnesses" although by counsel's own admission, his investigator probably reviewed discovery with Petitioner more than counsel did. App. 643 ll. 7 – 19; App. 670 ll. 12 – 18. Evidence that Petitioner had neither seen nor been informed about was utilized at his trial, and "[a] lot of witnesses didn't come into play until … a week before trial." Id.

At the time immediately prior to Petitioner's trial, counsel and Petitioner had not come to an agreement regarding defense strategy. App. 644 ll. 18 – 23. Counsel wanted Petitioner to testify in self-defense. App. 644 l. 24 – 645 l. 5. Counsel also thought that Petitioner should have taken a plea on the murder charge. App. 643 l. 24 – 644 l. 7. However, because Petitioner wished to go to trial, the case proceeded to trial.

Petitioner disagreed with the self-defense theory:

Q: What was [the self-defense claim]?

A: I didn't see it. But the victim was shot in the back and my counsel told me that if I testified to a self-defense theory that, you know, I could win on self-defense, and I just didn't see it.

Q: Well, what was your position in all of this, that you had nothing to do with it?

A: Yes.

App. 648 l. 16 – 649 l. 4.

Additionally, the trial judge did not see any evidence for a self-defense claim, either. App. 516 ll. 18 – 20. Petitioner was never sure—neither during nor after the trial—what the defense strategy actually was. App. 649 ll. 10 – 14. In fact, Petitioner was not alone in this regard. During closing arguments, counsel for the State similarly indicated "I'm not really sure what the defense is." App. 543 ll. 9 – 10; App. 649 ll. 15 – 20.

Counsel did not start preparing any defenses for Petitioner's case until trial was imminent: "Well, towards getting closer to trial we did start trying to come up with a defense. Up until that point, I really told him his best interest was to make a deal because there weren't any really good viable defenses that I could see." App. 668 ll. 16 – 22.

Petitioner and counsel got into some heated discussions regarding a plea deal on the murder charge and whether Petitioner "had a case to go to trial on." App. 670 ll. 1 – 8. Counsel

thought Petitioner should have taken the deal all along. App. 695 ll. 14 – 17. Petitioner maintained his innocence leading up to his guilty plea. App. 700 ll. 7 – 9.

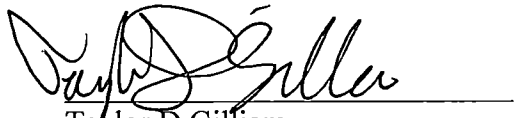
In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989).

Counsel repeatedly attempted to convince Petitioner to plead guilty. Counsel did not prepare for trial until immediately before it began, even though Petitioner never faltered in his desire for a trial. As a result of the delay in preparation, Petitioner was not informed of the evidence and witnesses that would be utilized against him. He therefore did not receive effective assistance of counsel. The prejudice in his case manifested itself in the guilty verdict, and Petitioner is entitled to a new trial on all of his charges.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Maite Murphy, Circuit Court Judge

LONDON DEVONTA WOODEN,

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 Julie Coleman, 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 London Devonta Wooden, #357930, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of November, 2017.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 13th day of November, 2017.

ATTORNEY FOR PETITIONER

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025