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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2015-001459

Travell L. Hill, ... Respondent-Petitioner,

vs

State of South Carolina, ... Petitioner-Respondent.

PETITIONER'S BRIEF OF RESPONDENT-PETITIONER

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STATEMENT OF THE CASE

Travell Hill was arrested on February 19, 2008, and charged with trafficking cocaine. He was tried before the Honorable G. Edward Welmaker and a jury on March 30-31, 2010. He was convicted and sentenced to 27 years in prison. His appeal was denied by the South Carolina Court of Appeals on May 15, 2013.

On January 9, 2014, Mr. Hill filed a Post Conviction Relief Petition. A hearing was held before the Honorable Daniel D. Hall on February 18, 2015. By his Order dated February 25, 2015, Judge Hall granted relief on the question of whether trial counsel was ineffective for his failure to preserve the legality of the search of the automobile he was driving. He denied relief on all other issues. By Order dated June 1, 2015, he affirmed his prior ruling. The State filed a Notice of Appeal on July 2, 2015, and Mr. Hill filed a timely Notice of Appeal on July 6, 2015. This Court granted the Petition for Write of Certiorari on the issue of whether trial counsel was ineffective as to his failure to cross-examine a witness as to the possible sentence she was facing.

ARGUMENT

Question I

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective when trial counsel did not cross-examine Tyra Rogers, who testified for the State, as to the possible sentence she was facing?

In *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002), this Court ruled that a defense attorney may cross-examine a testifying co-defendant as to the possible sentence the testifying co-defendant is facing. This Court said:

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.
> *Id.* at 333, 563 S.E.2d at 318.

The *Mizzel* case was decided over eight years before the trial of this case. Trial counsel admitted he was familiar with the case. App. at 280, ll 1-13. His decision not to ask the co-defendant about her possible sentence was that the trial judge would not follow the law. As he said:

> Q. (By Mr. Wise) You didn't think he would follow State v. Mozelle (sic)?
>
> A. (By Mr Posey) I did not, based on previous experience.

App. at 280, ll 11-13.

Trial counsel admitted if the jury knew what sentence she was facing the jury would look at her testimony closer. He testified:

> Q. Now, it certainly would have been helpful for the jury to understand that the co-defendant was up there testifying was looking at 25 years mandatory minimum?
>
> A. I have no doubt about that.
>
> Q. All right. That would have made them look at her testimony a little closer?
>
> A. I would hope so, yes.

App. at 279, ll 19-25.

Defense counsel expressed no trial strategy for not asking the witness the question about her possible punishment. He simply believed the trial judge would not follow the law. He

further admitted that if the trial judge did not follow the law, a good appellate issue could have been created. App. at 280, ll 18-25. He gave no justified trial strategy for not asking a question about her possible sentence. This Court has held that the failure to impeach a witness in a criminal sexual conduct case is a ground for granting a post conviction relief petition. *Pauling v. State,* 331 S.C. 606, 503 S.E.2d 468 (1998). In the present case, the principle witness against Mr. Hill was Tyra Rogers. The failure to impeach her with questions that were both proper and contained strong impeachable information is ineffective assistance of counsel. Nothing in the record justifies trial counsel's failure to impeach this witness. In *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) this Court said, "Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis in original). The reason given may be a valid reason as far as defense counsel maintaining a good relationship with the trial judge, but it is hardly a valid trial strategy reason as to his representation of his client. An attorney's loyalty is to his client and not his personal or professional relationship with the trial judge. The Post Conviction Relief judge should have granted Mr. Hill relief on this issue.

As Ms. Rogers was the key witness against Mr. Hill, her testimony was important in securing his conviction. Mr. Hill never admitted to knowing the drugs were in the car. Knowledge was imputed to Mr. Hill through the testimony of Ms. Rogers. At the trial of Mr. Hill, Tyra Rogers, the passenger in the automobile, testified she did not know any drugs were in the car. The drugs were found under the floor mat on her side of the automobile literally under her feet. They made a noticeable lump in the floor mat. App. at 123, ll 7-13. He was not the person who rented the automobile. Mr. Hill was prejudiced by the failure of his trial counsel to

properly impeach the witness against him. She testified:

> A. (By Ms. Rogers) I didn't know that it was in the car.
> App. at 124, l 6.

> A. And I just said I didn't know the drugs were in my vehicle at all and that I didn't make enough in a year - - because I asked them how much did something like that roughly cost. I said I don't even make that in a year to even think about paying for that.
> App. at 116, ll 4-6.

As the testimony of Rogers was the most important testimony against Mr. Hill, if not the only testimony, the failure of trial counsel to impeach her was prejudicial to his case. In a substantially similar case, this Court held the denial of the right to cross-examine a witness about a mandatory sentence was prejudicial. As this Court said:

> The sentence for trafficking in cocaine in the amount in question here is a mandatory one of at least twenty-five years without parole. S.C. Code Ann. § 44-53-370(e) (Supp.1989). The fact Bethel was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that appellant should have been permitted to present to the jury. Moreover, Bethel's testimony was a crucial part of the State's case since she provided the only evidence of appellant's knowing involvement in the drug transaction.
> *State v. Brown,* 303 S.C. 169, 171-72, 399 S.E.2d 593, 594 (1991)

Under *Strickland v. Washington*, 466 U.S. 668 (1984) this Court is not required to find that the trier of fact would likely have reached a different result. As the United States Supreme Court said in *Strickland*, a showing must be made that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. When important impeaching information that strongly impacts the credibility of the key witness, no court can objectively conclude that the result is reliable. The standard in *Strickland*, "a probability

sufficient to undermine confidence in the outcome" (*Id.* at 694) is certainly established when trial counsel fails to impeach the key witness against his client.

The Mr. Hill was prejudiced in this case just as the Defendant was in *Brown* cited above and *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). The law was clearly established at the time of the trial. Trial counsel knew of the law and elected to ignore it. Trial counsel failed to impeach the key witness against his client. This was prejudicial to Travell Hill and sufficient reason to grant him a new trial.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the lower court and grant Travell Hill a new trial.

March 19, 2018

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Respondent-Petitioner in the above entitled case. That on March 19, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petitioner's Brief of Respondent-Petitioner in the above case addressed to DeShawn Herman Mitchell, Senior Asst. Deputy Attorney General, P.O. Box 11549, Columbia, SC 29211.

Sandy Traynham

Sworn to and Subscribed
before me this 19th day
of March, 2018

Notary Public for South Carolina
My Commission Expires: 10/7/2019