STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marlboro County

Thomas A. Russo, Circuit Court Judge

ALLEN J. GATHINGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-000358

REPLY BRIEF OF PETITIONER

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Appellate counsel provided ineffective assistance by failing to raise on appeal all grounds on which the trial judge ruled where (1) the trial judge's alternative rulings were obvious in the transcript, (2) long-standing appellate procedural law requires affirmance when all grounds on which the trial judge ruled are not appealed, and (3) there is a reasonable probability Petitioner would have prevailed on appeal had all grounds been raised to the appellate court.

Recently, this Court clarified the standard of review an appellate court reviewing a PCR action must use when analyzing claims of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 688 (1984). Smalls v. State, ___ S.C. ___, 810 S.E.2d 836 (2018). This Court explained the "standard of review in PCR cases depends on the specific issue" raised on appeal. Id. at ___, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at ___, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. In another recent case, this Court explained the appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

The issue presented to this Court in the instant case is controlled by an error of law.[1] The PCR judge's conclusion that Petitioner could not show ineffective assistance of appellate counsel based upon Petitioner not presenting testimony from appellate counsel is an error of law. See App. 854. "There can be no dispute that the imposition of a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim contravenes our decisions requiring an objective inquiry into the adequacy and reasonableness of counsel's performance based on the full record before the court." Reeves v. Alabama, 138 S.Ct. 22, 23 (2017)(Mem)(Sotomayor, J., dissenting). The Supreme Court has never "required that a defendant present evidence of his counsel's actions or reasoning in the form of testimony from counsel, nor has it ever rejected an ineffective-assistance claim solely because the record did not include such testimony." Id. at 26. "Rather, Strickland and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, it should look to the full record presented by the defendant to determine whether the defendant satisfied his burden to prove deficient performance." Id. While the lack of counsel's testimony may make it more difficult for a defendant to satisfy his burden, "that fact alone does not absolve a court of its duty to look at the whole record and evaluate the reasonableness of counsel's professional assistance in light of that evidence." Id.

The Eleventh Circuit explained that where appellate counsel failed to raise a trial error that was "apparent on the face of the transcript" that was "so obviously valid that any competent lawyer would have raised it," then "no further evidence is needed to determine whether counsel was ineffective for not having done so." Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001). The

[1]The state's return to the petition for writ of certiorari seemed to maintain that appellate counsel's failure to raise all issues on which the trial judge's admissibility ruling was not deficient performance. Ret. at 6-7. However, the brief of respondent appears to abandon any argument regarding deficiency. BOR at 17-18.

court continued by noting that the defendant's failure "to question his appellate attorney about" the issue during the state's post-conviction relief proceeding had no impact on the question of appellate counsel's effectiveness because there was "no conceivable reason that she might have proffered [that] would have made her failure to pursue the claim reasonable." Id. According to the Eleventh Circuit, appellate counsel's "failure to raise it, standing alone, establishes her ineffectiveness." Id.

Similarly, addressing the state's argument "that ineffective assistance cannot be found if appellate counsel does not testify in a post-conviction proceeding" because "appellate counsel might have had strategic reasons for declining to raise" an issue on appeal, the Indiana Court of Appeals refused to adopt the state's argument. Fowler v. State, 977 N.E.2d 464, 468, (Ind. Ct. App. 2012). The court explained that though "it is presumably always 'possible' there are unknown or undisclosed 'reasons for not pursuing a claim,' adopting the state's rationale would effectively preclude a post-conviction remedy in any case where counsel did not testify." Id.

Thus, the PCR court's holding that Petitioner could not show ineffective assistance of appellate counsel based upon Petitioner not presenting testimony from appellate counsel was an error of law. "In evaluating whether appellate counsel performed deficiently by failing to raise an issue on appeal," the Indiana Supreme Court applies "the following test: (1) whether the unraised issue is significant and obvious from the face of the record and (2) whether the unraised issue is 'clearly stronger' than the raised issues." Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008). This test is almost identical to the test announced in Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). There, the Seventh Circuit explained that appellate counsel renders deficient performance by "fail[ing] to raise a significant and obvious issue." Gray, 800 F.2d at 646. After identifying "[s]ignificant issues which could have been raised," the reviewing court should compare those to the issues which were raised. Id. Further, "[a] reviewing court can evaluate appellate counsel's choice

of issues on appeal by examining the trial record and the appellate brief." Id. See also Ramchair v. Conway, 601 F.3d 66, 73 (2d Cir. 2010)(explaining that to establish deficient performance of appellate counsel, a defendant must show counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker").

Here, appellate counsel selected a single issue to raise on appeal, but failed to raise all grounds on which the trial judge ruled regarding the admission of the evidence. Based upon appellate counsel's selection of the issue, it is clear the issue was strong and obvious. The additional bases on which the admission of the evidence was decided were also obvious as they appeared in the same paragraphs deciding admissibility. Appellate counsel's failure to raise all grounds on which the judge ruled in relation to the issue resulted in the appellate court refusing to consider the issue at all. In effect, Petitioner was denied a direct appeal. See United State v. Cronic, 466 U.S. 648, 658-659 (1984)(explaining that prejudice is presumed from a complete denial of counsel, which includes circumstances of counsel failing to subject the prosecution's case to meaningful adversarial testing); Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000)(explaining that where counsel's deficient performance, such as failing to file a notice of appeal, results the forfeiture of a proceeding, such as a direct appeal, there is a complete denial of counsel during a critical stage of a judicial proceeding mandating a presumption of prejudice). Appellate counsel's conduct was an objectively unreasonable decision based upon controlling law in South Carolina regarding error preservation and appeals.

Concerning prejudice, the PCR court erred when it required Petitioner to prove he would have been successful on appeal had appellate counsel raised the issue properly. See App. 854 (requiring Petitioner show "he would have been successful on appeal had this issue been raised"); App. 855 (explaining Petitioner had to show "the outcome of his appeal would have been different

had appellate counsel raised this issue"). This was an error as a matter of law. Respondent argued that Strickland's prejudice standard of a reasonable probability that the outcome of the proceeding would have been different was the equivalent of "the outcome of the appeal *would have been* different." Ret. at 17 n.1 (emphasis added). In other words, according to Respondent, a Petitioner must show "guaranteed success on appeal" in order to prove prejudice from appellate counsel's deficient performance. See Ret. at 17 n.1. Petitioner agrees with Respondent that a "reasonable probability" is a "high bar," Petitioner disagrees that it is such a high bar that it requires Petitioner to prove guaranteed success on appeal. See Ret. at 17 n.1.

"The fundamental purpose of an appellate lawyer representing a defendant in a direct criminal appeal is to identify and argue bases for reversal of a conviction." Overstreet v. Warden, 811 F.3d 1283, 1287-1288 (11th Cir. 2016). "Appellate advocacy is meaningful if it reflects a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument." Ramchair v. Conway, 601 F.3d 66, 77 (2d Cir. 2010)(internal quotation omitted). In analyzing the prejudice prong, the Second Circuit explained "'[a] reasonable probability' that the outcome of the proceeding would have been different but for counsel's professionally unreasonable performance 'is a probability sufficient to undermine confidence in the outcome.'" Henry v. Poole, 409 F.3d 48, 64 (2d Cir. 2005)(quoting Strickland, 466 U.S. 668, 694 (1984)). Further on this point, the court explained "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance of the evidence* to have determined the outcome." Id. (quoting Strickland, 466 U.S. at 694)(emphasis in original). "[T]he prejudice component of the Strickland test ... focuses on the question whether counsel's deficient performance renders the result of the [appeal] unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

"To determine whether the failure to raise a claim on appeal resulted in prejudice," a reviewing court reviews "the merits of the omitted claim." Eagle, 279 F.3d at 943; see also Logan v. State, 293 P.3d 969, 974 (Okla. Crim. App. 2013)(explaining that determining prejudice from a claim of ineffective assistance of counsel "requires examining the merits of any omitted issues" and the "inquiry is about whether the defendant has established that there is a reasonable probability that the result of the appeal would have been different if an omitted issue(s) had been appealed originally, i.e., that a claim (or claims) now asserted would likely have prevailed if it (they) had been raised on direct appeal"). If the reviewing court concludes "that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the appeal." Eagle, 279 F.3d at 943. There can be little doubt that had appellate counsel included all bases for the judge's ruling, then the outcome of the appeal would have been different. The Court of Appeals would have been unable to refuse to even entertain Petitioner's appeal based upon a procedural bar. The Court of Appeals would have been forced to render a decision on the merits. At a minimum, the result of the proceeding would have been different based upon how the Court of Appeals would have analyzed the issue presented. Additionally, as expressed more fully in the brief of petitioner, but for appellate counsel's deficient performance, there is a reasonable probability that the outcome of the appeal would have been different in light of the governing case law.

Had appellate counsel raised all grounds on appeal concerning the issue presented there is a reasonable probability Petitioner's convictions would have been reversed in light of the controlling case law governing prior bad acts, the introduction of animus evidence, and the rule requiring exclusion of evidence where the probative value was substantially outweighed by the danger of unfair prejudice. Therefore, Petitioner is entitled to a new trial.

CONCLUSION

Petitioner respectfully requests this Court find appellate counsel provided deficient performance that was prejudicial to Petitioner and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Johnny James Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Petitioner has been served on Allen J. Gathings, #279208, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 24th day of April, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of April, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023