

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 26 2016

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Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

S.C. SUPREME COURT

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DAVID DWIGHT SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000262

—————
PETITION FOR WRIT OF CERTIORARI
—————

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ISSUES PRESENTED

I. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel withdrew the objection to the solicitor's admission of witness Otis Hyder, Sr.'s testimony from Petitioner's first trial in 1997, even though (1) Hyder was not unavailable as required by Rule 804 (a)(4), SCRE, and (2) Hyder was never cross-examined at the first trial regarding notes from an investigator that Hyder indicated that the Decedent had reached for Petitioner to take drugs from him?

II. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to present Morgan Simmons Ortez as a witness where her testimony was necessary to establish that the Decedent told her that he had tried to rob another drug dealer earlier on the same evening that he died?

III. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to cross-examine Angie Smith regarding whether she had been rewarded for her cooperation with the prosecution by not being charged with any criminal offenses for her role in the incident?

STATEMENT OF THE CASE

Indictment, Trial, and Reversal of Convictions

On April 7, 1997, Petitioner David Smith was indicted by the Spartanburg County Grand Jury for one count of murder and one count possession of a firearm during the commission of a violent crime. App. 725.

Smith's was first tried on the indicted offenses on December 4, 1997 and convicted. Supp. App. 2.

Following dismissal of his direct appeal, Smith filed an application for post-conviction relief on June 7, 2000. Supp. App. 1 – 2. An evidentiary hearing was held before the Honorable Donald W. Beatty on November 6, 2002 and January 27, 2003. Smith was represented by Bill Godfrey and the state was represented by assistant attorney general Douglas Leadbitter. On May 23, 2003, Judge Beatty filed an order granting Smith's application for post-conviction relief and remanded his case for a new trial. Supp. App. 1. The state filed a petition for writ of certiorari, to which Smith filed a Return. Supp App. 12; Supp. App. 27. The Supreme Court filed an order denying certiorari on December 1, 2004. Supp. App. 37.

Re-Trial

On October 31, 2005, Smith was retried before the Honorable Jack Early. App. 1. Smith was represented by Bill Godfrey, and the state was represented by assistant solicitors Robert Coler and Sara Ganns. App. 1. The jury found Smith guilty of both offenses. App. 314, ll. 1-23. Judge Early sentenced Smith to concurrent sentences of thirty-five years and five years. App. 320, ll. 7-12.

Direct Appeal

On direct appeal, Smith was represented by former Chief Appellate Defender Joseph Savitz. The issues raised in the Brief of Appellant filed May 8, 2007, included: (1) Whether the trial judge erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter?, (2) Whether the trial judge erred in refusing to instruct the jury on the lesser-included offense of involuntary manslaughter?; and (3) Whether the trial judge erred in refusing to instruct the jury on the law of accident? App. 322 – 336. The State filed its Brief of Respondent on April 20, 2007. App. 337 – 351. Oral argument was held on November 6, 2007.

On March 20, 2008, the Court of Appeals issued an unpublished opinion reversing the trial court and remanding Smith's case for a new trial based on the trial judge's refusal to instruct the jury on voluntary manslaughter. Because the Court of Appeals granted relief on that issue, it did not reach the other issues raised by Smith. App. 352 – 355. The State filed a petition for rehearing and suggestion for rehearing en banc, which was denied. App. 356 - 365; App. 366 – 369.

The State filed a petition for writ of certiorari on August 19, 2008, to which Savitz filed a Return on December 18, 2008. App. 370 – 390; App. 391 – 403. The Supreme Court granted certiorari on April 10, 2009 and ordered further briefing. App. 410. The Brief of Petitioner was filed on May 12, 2009. App. 405 – 426. The Brief of Respondent was filed on August 11, 2009. App. 427 – 439. Following oral argument held on January 21, 2010, the Supreme Court issued an opinion on February 7, 2011, reversing the Court of Appeals' opinion and reinstating Smith's convictions and sentences. App. 440 – 445. The remittitur was issued on February 24, 2011.

Post-Conviction Relief Application and Hearing

On March 17, 2011, Smith filed his application for post-conviction relief (“PCR”). App. 447 – 452. On March 18, 2015, Smith filed an amended PCR application through his PCR attorney, Tara Shurling. App. 454 – 461. The State filed its Return on May 1, 2012. App. 462 – 469. On June 11, 2015, Smith filed a superseding amended PCR application through PCR counsel. App. 471 – 479.

On June 11, 2015, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Smith was represented by Tara Shurling, and the state was represented by assistant attorney general Suzanne White. App. 480. On December 8, 2015, PCR counsel filed a Memorandum in Support of PCR in the form of a proposed order. App. 660 – 696.

Order of Dismissal and Rule 59(e) Motion

On December 14, 2018, Judge Sprouse filed an Order of Dismissal, denying Smith’s application for post-conviction relief. App. 697 – 713. On January 4, 2016, PCR counsel filed a Rule 59(e) motion to alter or amend. App. 714 – 723. Judge Sprouse filed an Order denying the motion, which he termed a motion for reconsideration, on January 13, 2016. App. 724.

STANDARD OF REVIEW

This Court will not uphold the findings of a PCR court if no probative evidence supports those findings. Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). To establish a claim of ineffective assistance of counsel, the PCR applicant has the burden of proving: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); Rhodes v. State, 349 S.C. 25, 30–31, 561 S.E.2d 606, 609 (2002)). Regarding the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366 (1985) (citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

The United States Supreme Court specifically ruled that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Moreover, the Court ruled that: “The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Id. at 696 (emphasis added). “[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant’s prejudice.” Black v. State, 151 S.W.3d 49 (Mo. 2004).

ARGUMENT

- I. **The PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel withdrew the objection to the solicitor's admission of witness Otis Hyder, Sr.'s testimony from Petitioner's first trial in 1997, even though (1) Hyder was not unavailable as required by Rule 804 (a)(4), SCRE, and (2) Hyder was never cross-examined at the first trial regarding notes from an investigator that Hyder indicated that the Decedent had reached for Petitioner to take drugs from him.**

Introduction

Decedent planned to rob a drug dealer on the night that he died. App. 633. Petitioner Smith was a licensed aircraft mechanic but began selling drugs when he was out of work. App. 203, l. 1 – 204, l. 3. Smith drove over to the house of Angie Smith (no relation) (hereinafter “Angie”) after she paged him in the early morning hours of January 12, 1997. App. 204, l. 14 – 205, l. 11. Angie directed Smith to drive to the trailer of Otis Hyder, Sr., where there was supposed to be a customer to buy cocaine. When they got there, Angie went inside to “see what was going on.” She returned to the car and told Smith that the person wanted to deal with Smith, not her. Smith asked Angie who she was talking about, at which point she finally disclosed that it was Decedent. App. 205, l. 12 – 207, l. 1.

Smith was hesitant to deal with Decedent because he knew that Decedent already owed Rodney Smith, Angie's brother, some money for drugs. He went inside anyway because it was 2:30 a.m., they had driven all of the way there, and Angie told him that Decedent had the money. App. 207, ll. 2-23. Smith put the drugs on the table and Decedent “checked them out.” App. 208, l. 2 – 209, l. 4. Decedent said that he did not have the money but could pay him tomorrow. When Smith indicated that was not okay, Decedent said “well, I'm taking this” and started to come towards Smith with “a real serious demeanor.” App. 209, l. – 210, l. 11. Smith pulled his gun from his pocket and held it by his side in the hopes that Decedent, who was 6'2” and

“looked like he was on something,” would back off. App. 210, l. 22 – 211, l. 15; App. 214, ll. 14-21; App. 232, l. 1 – 233, l. 12. Decedent said: “Oh, you got a gun, what are you gonna do, shoot me, give me the gun, I’ll shoot myself.” App. 211, ll. 17-19. Smith told him: “No, that’s not what I’m trying to do. Just give me my stuff back and let me leave.” App. 211, ll. 19-21. As Smith tried to put his hands in his pocket and head for door, Decedent came at him and tried to knock the gun out of his hand. App. 212, ll. 4-20; App. 239, ll. 14-18. It was then that Smith hit Decedent with the butt of the gun as they struggled, eventually falling out of the trailer door. App. 212, l. 14 – 213, l. 18. Smith did not pull the trigger, but the gun went off. App. 213, l. 19 – 214, l. 6. Decedent died from a single gunshot wound to the head. App. 170, ll. 18-24.

The State’s theory of the case was that Petitioner Smith was upset over the forty dollar debt that Decedent owed. The solicitor argued that Smith went to the trailer door on the night of the incident with the intention of shooting Decedent such that he was guilty of murder. App. 293, ll. 1-24. The defense’s theory of the case was that Smith acted in self-defense when Decedent tried to rob him, or at the very most that his actions amounted to voluntary or involuntary manslaughter. App. 279, l. 8 – 280, l. 22; App. 271, ll. 9-18. Ultimately, the trial

judge only charged the jury on murder and self-defense.¹ App. 271, ll. 1-5.

At the PCR hearing, trial counsel Bill Godfrey acknowledged that he was the PCR attorney who handled Smith's 2002 PCR hearing, which resulted in his retrial. During his representation of Smith as PCR counsel, Godfrey discovered handwritten notes in the solicitor's file regarding an interview conducted with Otis Hyder, Sr., at whose trailer the shooting occurred. They included: "That's when Finley [Decedent] reached for Smith, he intended to take

¹ Notably, the jury asked "if there is no self-defense, can he still be guilty of a lesser crime?" App. 312, ll. 4-12. On direct appeal, this Court ruled that Smith was not entitled to charges on the lesser-included offenses of voluntary manslaughter, involuntary manslaughter, or accident and noted that it was "not entirely clear why self-defense was charged." App. 443 – 445. Respectfully, this Court took a very narrow view of Smith's trial testimony, summarizing Smith's testimony regarding his encounter with Decedent inside the trailer as:

Victim wanted \$50 worth of crack cocaine. Smith placed the drugs on the counter for inspection. Victim informed Smith he had no money, but he would pay him the next day. Smith refused to again give Victim drugs on credit. Victim responded that he was taking the drugs anyway and approached Smith with a "real serious demeanor." At this point, Smith pulled his gun and pointed it at Victim, who was unarmed. Victim continued to approach Smith, stating "what are you gonna do, shoot me, give me the gun, I'll shoot myself." Victim grabbed Smith, trying to knock the gun out of Smith's hand. Smith struck Victim in the face with the gun. As the two men were struggling near the entrance to trailer, the "the gun went off."

App. 442. Smith specifically denied pointing the gun at Decedent. He pulled it out of his pocket and held it to his side in the hopes that Decedent would calm down and give him back the drugs. Smith further noted that Decedent was 6'2" tall and appeared to be high. Thereafter, Smith attempted to put his hands, and consequently the gun, back in his pocket and leave the trailer. It was then, as Smith was attempting to retreat, that Decedent lunged at him and tried to get the gun. These additional facts, all contained within Smith's trial testimony, were essential to the analysis of Smith's entitlement to charges on the lesser-included offenses. See Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999) (A trial judge **must** charge a lesser included offense if there is **any evidence** from which the jury could infer the defendant committed the lesser rather than the greater offense." (emphasis added)); State v. Knoten, 347 S.C. 296, 308-09, 555 S.E.2d 391, 398 (2001) ("In determining the issues to be submitted to the jury ... all of the testimony, both for the State and the defense, must be considered.... The fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State." (quoting State v. Moore, 245 S.C. 416, 420-21, 140 S.E.2d 779, 781 (1965)))

drugs from him.” App. 605. The notes were not disclosed to the defense during Smith’s first trial, which was part of the basis for the original reversal of Smith’s convictions. Supp. App. 4 – 5. Godfrey originally objected to the solicitor’s attempt to admit the transcript of Hyder’s testimony at the Smith’s retrial because the solicitor had not shown that he was unavailable, but he withdrew his objection even after the solicitor discovered that Hyder was alive. App. 149, l. 10 – 158, l. 16; App. 160, l. 1 – 161, l. 17. At the PCR hearing, Godfrey testified that he could not recall why he withdrew his objection. App. 505, l. 14 – 507, l. 21; App. 518, ll. 3-23. Smith was prejudiced by the admission of Hyder’s testimony because Hyder’s testimony from the first trial did not include any reference to the notes in the solicitor’s file that indicated that Hyder saw Decedent reach for Smith and try to take drugs from him. This testimony would have supported Smith’s theory of the case, that he was being robbed by Decedent at the time of the incident.

Trial counsel also failed to call Morgan Simmons Ortez, who was dating Decedent at the time of his death, to testify at the retrial. Ortez gave a statement to police in which she said that Decedent told her that he tried to rob a drug dealer earlier on the same night that he died. Ortez’s handwritten statement was admitted as an exhibit at the PCR hearing and could have been used to impeach her had she denied it at trial. App 629 - 633. Godfrey could not recall why he did not call Ortez as a witness. App. 531, l. 12 – 533, l. 20. Smith was prejudiced because Ortez’s testimony would have also supported Smith’s theory of the case, that he was being robbed by Decedent at the time of the incident.

Angie Smith was called to testify at the trial, but Godfrey failed to question her regarding whether the solicitor’s office had rewarded her cooperation by not charging her with any crimes, despite her admission that she participated in the distribution of cocaine and circumstantial evidence that she participated in an attempted robbery plan with Decedent. Godfrey testified that

he did not think of questioning Angie about the solicitor's failure to charge her with any offense. App. 490, ll. 19-24; App. 497, l. 24 – 499, l. 23. Smith was prejudiced because the witnesses' credibility was essential and trial counsel failed to bring this potential basis for Angie's bias to the jury's attention.

Relevant Facts

At Smith's retrial, the solicitor told the trial judge that they intended to offer the transcript of Otis Hyder, Sr.'s prior testimony because he was deceased, pursuant to Rule 804(a)(4), SCRE. App. 25, ll. 12-24; see also App. 12, ll. 2-3. The trial judge instructed the attorneys not to mention Hyder in their opening statements and said he would hear full argument on the matter later. App. 25, l. 25 – 26, l. 8. When the hearing was held at the end of the first day of trial, Godfrey objected to the admission of Hyder's prior testimony because the State had not provided any proof that Hyder was actually deceased. App. 149, l. 10 – 150, l. 22. The solicitor said that he has not been able to locate a death certificate but was told by one of his other witnesses that Hyder died. App. 150, l. 24 – 151, l. 3. The trial judge instructed the solicitor to either bring a copy of the death certificate or a picture of the tombstone, but said that he would require the solicitor to prove Hyder was dead before he allowed the testimony. App. 151, ll. 4-14. Godfrey argued that even if Hyder were deceased, he was not cross-examined on the investigator's notes that the solicitor failed to disclose. App. 151, l. 15 – 157, l. 16; see also Supp. App. 4 – 5. The trial judge said that he was inclined to allow the testimony in provided that the solicitor provided some proof that Hyder was deceased. App. 157, l. 17 – 158, l. 16.

The next morning, the trial judge said: "As I understand, the work of the day is 'he's alive.'" App. 160, ll. 1-4. The solicitor admitted that they had some bad information and that Hyder was alive. The solicitor said that Hyder's son was present to explain that Hyder was

“home bound and not well.” App. 160, ll. 8-14. However, the solicitor advised the court that the point was moot because the defense agreed to the admission of the prior trial’s testimony. App. 160, ll. 14-19. Godfrey confirmed that he was withdrawing his objection to the testimony and had discussed the matter briefly with Smith. App. 161, ll. 5-14. Smith advised the court that he did not have any questions about it. App. 161, ll. 15-17. Hyder’s testimony from the first trial was subsequently read into the record before the jury. App. 182, l. 13 – 183, l. 12; see App. 640 (Applicant’s Ex. 13, Transcript excerpt of Otis Hyder testimony).

At the PCR hearing, Godfrey testified that he came into possession of the investigator’s notes on Hyder when he went to get a copy of the solicitor’s file for purposes of Smith’s first PCR. The solicitor was never able to confirm who wrote them, but the important part was that Hyder said: “That’s when Finley reached for Smith. He intended to take drugs from him.” App. 499, l. 24 – 503, l. 12; App. 605 (Applicant’s Ex. 3, handwritten notes). Godfrey acknowledged that he initially objected to the admission of Hyder’s transcript testimony, but when asked why he withdrew his objection after Hyder was found alive, Godfrey testified: “I just did not object” and “I don’t remember.” App. 505, l. 14 – 507, l. 21; App. 518, ll. 3-23. As PCR counsel continued to question Godfrey about the decision to waive his prior objection, the Attorney General objected and PCR judge cut PCR counsel’s questioning off. App. 534, l. 21 – 537, l. 7. The Attorney General said: “I think he said several times that he cannot recall why he withdrew the objection.” App. 536, ll. 22-24.

Smith testified that he was under the impression that the notes regarding Hyder’s statement to the solicitor’s investigator would also be admitted when they agreed to the admission of the transcript of Hyder’s testimony. Had Smith understood that the notes would not

be admitted, he would not have agreed to the admission of the transcript testimony. 569, l. 12 – 571, l. 3.

The PCR court ruled that Smith failed to meet his burden of proof regarding error and prejudice as to his allegations that Godfrey was deficient in failing to object to the admission of Hyder's transcript testimony. App. 706 – 708; App. 710. Specifically, the PCR court found that the trial judge had rejected Godfrey's argument that the testimony was inadmissible because Hyder was not cross-examined on the notes found in the solicitor's file after Smith's first trial. App. 706. The PCR court further ruled that Godfrey was not questioned regarding why he advised Smith to withdraw the objection to Hyder's testimony once the solicitors discovered that Hyder was alive. App. 707 – 708. Lastly, the PCR Court found that Godfrey's failure to object under 804(a)(4) was somehow explained by Godfrey's reference to portions of Hyder's testimony in his closing argument, Angie and Smith's testimony that Smith and the Decedent fought, and the fact that the solicitor presented Hyder's son to testify that Hyder was alive but ill. App. 710.

Discussion

The PCR court erred in finding that Smith did not meet his burden of proof as to Godfrey's deficient performance when it came to the admission of Hyder's testimony. Godfrey provided no explanation for why he withdrew the objection to Hyder's testimony. App. 536, ll. 22-24. Remarkably absent from the PCR court's order of dismissal is the trial judge's ruling that, regardless of whether Hyder had been cross-examined regarding the notes that indicated that Decedent was trying to take drugs from Smith, the solicitor was required to prove that Hyder was deceased. App. 151, ll. 4-14; App. 158, ll. 6-12. The trial judge conditioned his preliminary ruling by saying the testimony would be admissible "provided they satisfy me that the, Pops is

dead.” App. 158, ll. 8-9. Thus, had Godfrey not withdrawn his objection to the admission of the transcript, the solicitor would surely not have been able to satisfy the “unavailability” requirement of Rule 404(a)(4), SCRE, once it was discovered that Hyder was alive.

“The party offering the statement bears the burden of establishing unavailability.” Dodd v. Berlinsky, 344 S.C. 172, 177, 543 S.E.2d 237, 240 (Ct. App. 2001) (citing State v. Kinloch, 338 S.C. 385, 391 n. 6, 526 S.E.2d 705, 708 n. 6 (2000). “The mere absence of the declarant from the hearing does not establish unavailability.” Id. While the solicitor represented that Hyder was “home bound and not well,” those statements would still not have satisfied any other provision of Rule 404(a), SCRE, as there was no testimony that Hyder had an legal privilege, refused to testify despite a court order, lacked memory regarding the subject matter, or was unable to be served with process. Hyder’s son did not say anything to the court other than his father was living and that he would pass on the court’s regards. App. 161, ll. 1-4. The solicitor’s representations regarding Hyder’s health were no more reliable than his representations that Hyder was deceased, which ultimately was not accurate.

Godfrey’s inexplicable acceptance of the representations was deficient in light of the content of Hyder’s testimony at Smith’s first trial. Hyder testified that after Angie went outside, Smith came into the trailer he overheard Decedent tell him “he didn’t have his \$40, his money yet. But said as soon as he got a job he would pay him.” App. 641, l. 18 – 642, l. 24. Hyder said that Smith appeared agitated. Even though they were not yelling, pushing, or shoving, Hyder told them to go outside. Smith walked out and Decedent followed him and stood in the doorway. App. 643, l. 1 – 644, l. 3; App. 645, ll. 5-17; App. 646, ll. 18-22. He could not hear what was said once Smith walked out of the door, but that just before they went through the doorway he heard Decedent say “Was you gonna shoot me?” and “Well, if you will give me the gun I’ll

[help] you.” App. 645, l. 13 – 646, l. 9. Hyder claimed that he saw Decedent’s shoulder move and immediately heard a gunshot. App. 646, ll. 10-13.

On cross-examination, Hyder denied that Smith ever laid any drugs on the table. He further denied the portion of his written statement, which was transcribed by police, that said “Robert grabbed something from the man” or that Smith backed up out of the trailer. Hyder excused the errors because his statement was given at 4:22 a.m. and he was upset because Decedent had just died. App. 647, l. 23 – 650, l. 14; App. 654, l. 16 – 657, l. 19. Because the notes were not disclosed to the defense prior to Smith’s first trial, Hyder was never confronted with the fact that he had also told the solicitor’s investigator that “Smith backed off – Finley reached for him.” or “That’s when Finley reached for Smith, he intended to take drugs from him. App. 605. Trial counsel’s references to Hyder’s testimony during his closing argument do not reveal a reasonable trial strategy in light of the damaging and incomplete testimony that Hyder gave at the first trial. App. 277, l. 21 – 279, l. 10; App. 282, ll. 8-12.

Smith was prejudiced by the admission of Hyder’s testimony because the solicitor’s office did not show that he was “unavailable” and the testimony at the first trial was incomplete. Had Hyder been brought to the courthouse to testify, or even appeared via Skype were his illness actually confirmed, the transcript of his prior testimony could have been used to refresh Hyder’s recollection or impeach him. See Rule 612, SCRE; Rule 607, SCRE. Hyder could have additionally been confronted with his statements to the solicitor’s investigator, which would have belied his prior testimony that he misspoke as a result of the late hour and his grief. Thus, there was no probative evidence to support the PCR court’s finding that Smith failed to meet his burden of proof that Godfrey was ineffective in withdrawing the objection to Hyder’s transcript testimony.

II. The PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to present Morgan Simmons Ortez as a witness where her testimony was necessary to establish that the Decedent told her that he had tried to rob another drug dealer earlier on the same evening that he died.

Relevant Facts

Morgan Simmons Ortez was dating Decedent at the time of his death. App. 531, ll. 12-15. In her handwritten statement for police, she wrote that Decedent told her earlier on the evening of his death that he had tried to rob a drug dealer. The statement was made an exhibit at the PCR hearing. App. 633 (Applicant's Ex. 9, statement of Morgan Simmons).² At the PCR hearing, Godfrey responded "I really don't know," when asked why he did not call Ortez as a defense witness at Smith's trial. App. 531, l. 12 – 532, l. 22. Godfrey agreed that Ortez's testimony was relevant because his theory of the case was that Decedent attempted to rob Smith later that same night. App. 532, l. 23 – 533, l. 20.

The PCR court ruled:

Applicant alleges Counsel was ineffective for failing to present Morgan Simmons as a witness at trial because she gave a written statement that the victim had said "he had tried to rob a drug dealer." (App. para. 12). Counsel testified he did not know why he did not present Simmons as a witness. Counsel also testified he employed an investigator who was responsible for interviewing any potential witnesses, including those who had given statements. This Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

App. 709. Notably, Godfrey's testimony about having employed a private investigator to investigate the potential witnesses related to another witness, Terry Bradley, who was not called to testify at Smith's retrial. App. 526, l. 23 – 527, l. 19.

² Applicant's Exhibit 9 is also on file with this Court due to the inability to reproduce a clear copy of all of the pages within the Appendix.

Discussion

The failure of defense counsel to call a witness at trial can constitute deficient performance. See, e.g., Lounds v. State, 380 S.C. 454, 460-63 670 S.E.2d 646, 649-51 (2008) (holding counsel ineffective where there was no strategic reason not call corroborating witness and petitioner was “clearly” prejudiced by failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (holding counsel ineffective where triage nurse’s notes would have provided substantive evidence that a sexual battery did not occur and impeached the victim's credibility); Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991) (holding counsel ineffective where he admitted that witness testimony may have made the difference in obtaining an acquittal). “In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing *or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence.*” Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (emphasis added).

In the present case, Ortez’s statement to police was admitted into evidence at the PCR hearing. App. 531, ll. 16-24; App. 629 – 633; see also App. 494, ll. 2-25. Had Ortez been called as a witness at Smith’s retrial, counsel could have presented her with a copy of her handwritten statement, which included “He came back about [indecipherable] minutes later and said that he had tried to rob a drug dealer.” App. 633. Had Ortez not been able to recall or denied including that in her statement, counsel could have used the handwritten statement to refresh her recollection or impeach here. See Rule 612, SCRE; Rule 607, SCRE; Rutland v. State, 415 S.C. 570, 577-78, 785 S.E.2d 350, 353-54 (2016) (finding that had the witness denied her prior statements, trial counsel could have impeached her with the written statement or news article in

which she was quoted as saying the victim was armed, which would have affected her credibility). Evidence that Decedent tried to rob a drug dealer mere hours prior to the incident with Smith would have added credence to Smith's testimony that Decedent was attempting to rob him. Thus, Smith was prejudiced by Godfrey's failure to call Ortez as a witness at his retrial.

III. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to cross-examine Angie Smith regarding whether she had been rewarded for her cooperation with the prosecution by not being charged with any criminal offenses for her role in the incident?

Relevant Facts

Angie Smith claimed that Decedent called her house at approximately 2:00 a.m. looking to buy drugs from her brother, Rodney. Rodney did not want to get up, so she offered to page Smith for Decedent. Smith showed up at her house five minutes later and she got in the car with him. App. 64, l. 21 – 69, l. 19; App. 85, l. 20 – 87, l. 23. Initially, Angie testified that Smith told her that Decedent owed him forty dollars for drugs. App. 70, ll. 12-17. However, she later said that she did not know about the forty dollar debt until Decedent told her. App. 95, l. 15 – 96, l. 1; App. 96, ll. 16-21. Angie claimed that when they got to the trailer, she went inside to see what Decedent wanted and get his money but that she did not take any drugs inside with her. App. 71, ll. 4-16; App. 72, ll. 10-15. She came back out and told Smith that Robert did not give her any money or did not have any money and that he needed to “handle it on [his] own.” App. 71, ll. 16-19; App. 73, ll. 17-23.

According to Angie, she sat in the car and started smoking a cigarette. When she lifted her head up approximately two minutes later, Decedent and Smith were coming out of the door “scuffling” and she heard a “pop.” Tr. 71, l. 20 – 72, l. 1; Tr. 75, ll. 14-22; Tr. 77, ll. 2-8. She claimed that Smith got in the car and said “you don't know nothing, you ain't seen nothing.”

App. 72, ll. 1-4. Notably, in Angie's written statement for police she said that Smith was inside for five to seven minutes and that she saw Smith coming out of the door first. App. 599 (Applicant's Ex. 2).

At the PCR hearing, Godfrey agreed that Angie's testimony at trial amounted to an admission that she had committed the crime of distribution of cocaine. Yet, he said that he did not question her about any potential benefit that she received from the solicitor in exchange for her testimony because "there was no charges." App. 497, l. 24 – 498, l. 14. However, Godfrey agreed that Angie's failure to be charged would have been a benefit to her that he **should** have pointed to the jury. App. 498, ll. 15-19. He also agreed that he could have pointed out that the solicitor could pursued charges against Angie under a theory of accomplice liability and failed to do so. App. 498, l. 21 – 499, l. 23. He further testified that he did not think of questioning the witnesses at the retrial regarding whether they received any benefits in exchange for their testimony at Smith's original trial. App. 490, ll. 19-24. Smith testified that, to his knowledge, the only other person charged with respect to the incident was his wife. Those charges were eventually dismissed. App. 584, l. 11 – 585, l. 3.

The PCR court found that Smith "produced no evidence at the PCR hearing that there were any charges that were either dismissed or not pursued" against the State's witnesses. App. 703. The court further found neither Godfrey nor Smith knew of any charges against anyone related to the incident that were either dropped or not pursued. App. 704; App. 705. Specifically regarding Angie Smith, the PCR court found that Godfrey testified that he did not cross-examine Angie regarding potential charges that the solicitor did not pursue "because she was not charged." App. 705. Thus, the PCR court ruled that Smith had not satisfied his burden of proof. App. 704 – 705.

In the Rule 59(e) motion, PCR counsel asked the PCR judge to reconsider his decision, arguing that the PCR court misconstrued Smith's argument. App. 714 – 719. PCR counsel clarified that the basis for trial counsel's questions regarding Smith's failure to be charged was found in Smith's trial testimony, in which she admitted her involvement in multiple drug transactions. App. 717 – 718. PCR counsel argued that the PCR court's ruling effectively allowed the solicitor to circumvent impeachment of their witnesses by delaying the filing of charges against the witness. App. 717.

Discussion

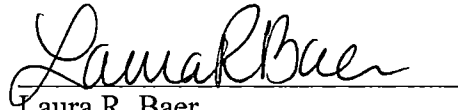
“Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Rule 608(c), SCRE. “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.” State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469 (1984)). Rule 608(c), SCRE, “preserves South Carolina precedent holding that generally, ‘anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.’ ” State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

In the present case, credibility was essential. The jury was either going to believe Smith's version of events or the version put forth by the state. While there were some helpful portions of Angie's testimony, she was called as a witness by the solicitor, who asked her questions about when she “saw David [Smith] shoot Robert [Decedent].” App. 92, ll. 15-24.

Her testimony insinuated that Smith purposefully retrieved a gun from the car door before he went inside. App. 92, l. 25 – 93, l. 19. While her testimony changed, she also testified at one point that Smith told her that Decedent owed him forty dollars. App. 70, ll. 12-17. Angie’s admission to involvement in the drug deal between Smith and Decedent was certainly a sufficient basis upon which trial counsel could, and should, have drawn out that she had not faced any criminal charges. Tr. 72, ll. 10-15. The PCR court erred in essentially requiring Smith to show that the solicitor’s office had threatened Angie with criminal charges. PCR counsel’s admission that he did not think of asking Smith about the solicitor’s failure to charge her with any crime despite her inculpatory testimony was sufficient evidence to prove Smith’s allegation.

CONCLUSION

Based on the foregoing, Petitioner David Dwight Smith respectfully requests that this Court grant this petition for writ of certiorari and order further briefing of all issues.

A handwritten signature in cursive script, reading "Laura R. Baer", written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID DWIGHT SMITH,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

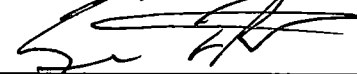
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on David Dwight Smith, #245760, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 26th day of October, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of October, 2016.



(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.