

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

CASE NO. 2018-000151

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AUG 06 2018

S.C. SUPREME COURT

Steven Lee Morgan, #355128

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Post-Conviction Relief Court err in holding that Petitioner's trial counsel was not ineffective in failing to properly handle the issue of third-party DNA by failing to perform a reasonable investigation and by failing to retain an independent DNA expert?
2. Did the Post-Conviction Relief Court err in holding that Petitioner's trial counsel was not ineffective in failing to object to expert opinion testimony of a SLED analyst who did not personally perform the DNA analysis and in failing to renew his request for a *Williams* charge at the close of trial?

STATEMENT OF THE CASE

In April 2012, Petitioner Steven Lee Morgan (“Petitioner”) was indicted for one count of attempted murder (App. p. 573), one count of burglary, first degree (App. p. 580), one count of kidnapping (App. p. 587), one count of criminal sexual conduct, first degree (App. p. 594) and one count of possession of a firearm or knife during the commission of a violent crime. (App. p. 600). On April 23, 2013, he proceeded to trial in front of Judge R. Markley Dennis. Petitioner was found guilty as indicted on all charges, and Judge Dennis sentenced him to forty years for the first degree burglary, and thirty years each for the first degree criminal sexual conduct, kidnapping, and attempted murder. (App. p. 459; pp. 460-61). The sentences were ordered to be served concurrently. (App. p. 460). Petitioner was also sentenced to five years for the count of possession of a knife during the commission of a crime, this sentence to be served consecutively to the rest. (App. p. 460-61).

The Petitioner served and filed a timely Notice of Appeal. The South Carolina Court of Appeals affirmed the Petitioner’s convictions and sentencing on October 21, 2015, finding that the trial court failed to preserve the issues for review. (App. pp. 664-665). *State v. Morgan*, Op. No. 2015-UP-492 (filed October 21, 2015).

On December 4, 2015, Petitioner filed and served an Application For Post-Conviction relief, by which he sought a vacation of his convictions and sentencing, and a new trial. (App. p. 463). In his Application, Petitioner alleged that his court-appointed trial counsel was ineffective for 1) failing to retain an independent DNA expert for the defense of the case; 2) failing to object to expert opinion testimony of a SLED analyst who did not personally perform the DNA analysis; and 3) refusing to allow Petitioner to testify at trial, against Petitioner’s wishes. On June 19, 2016, the Respondent, the State of South Carolina (“Respondent”) made its return (App.

p. 470) and an evidentiary hearing was held in the Berkeley County Courthouse on July 31, 2017. (App. p. 476). The Petitioner was represented by his attorney, Rodney Davis. The Respondent was represented by Lindsey McCallister of the South Carolina Attorney General's Office. The Petitioner and Chad Shelton, Petitioner's trial counsel, testified at the hearing. On December 18, 2017, the Honorable Michael G. Nettles issued an Order of Dismissal denying the Petitioner relief. (App. p. 548).

STATEMENT OF FACTS

The convictions were based upon a sequence of events that were found to have transpired on January 29, 2012. The victim, Rose Lampkin, and the Petitioner had been in a romantic relationship for several years prior to that date during which time Petitioner lived with Ms. Lampkin. (App. p. 111). In December of 2011, that relationship ended, and the victim moved Petitioner's belongings from her home. (App. p. 114). According to the victim's testimony at trial, on the night of the incident, Petitioner broke into the victim's home by shattering a sliding glass door. (App. p. 115). Armed with a knife, he then chased her upstairs, threw her to the bed, and raped her both anally and vaginally. (App. pp. 116-17; p. 122; p. 165; p. 222). The victim testified that once he was finished sexually assaulting her, he sat in the bed and smoked a cigarette. (App. p. 117). When she tried to escape, he pushed her down a flight of stairs, beat her, and cut her neck with the knife. (App. p. 118). The victim testified that Petitioner then forced her back upstairs, where he sexually assaulted her again, and bound and gagged her with coat hanger wire and a towel torn into strips. (App. pp. 118-19; p. 133; pp. 120-21). After the Petitioner eventually left the home, the victim was able to free herself from the wire binding and alert a passing neighbor. (App. pp. 123-24). Law enforcement was called and arrived to assist victim and investigate the scene. (App. pp. 193-94).

The crime scene investigation produced a number of DNA samples collected from the victim's body, the coat hanger wire, the towel used to gag the victim, a blood-stained green jacket, a stained sheet from the victim's bed, and cigarette butts found on the floor next to the bed. (App. pp. 272-73; pp. 274-77; p. 284; pp. 288-89). Additional DNA samples were obtained from the sexual assault examination of the victim. (App. pp. 222-23; p. 227).

Petitioner was apprehended and arrested in Augusta, Georgia, the following day while in possession of the victim's truck. (App. p. 136; pp. 41; p. 246; p. 253). No evidence was found in the initial search of the truck; however, Victor Mazyck, a friend of the victim who later bought the truck, discovered the knife alleged to have been used in the assault, as well as the victim's keys, in the center console of the truck. (App. pp. 136-39; pp. 247-49; pp. 257-59). That evidence was turned over to authorities and the knife was submitted for DNA analysis. (App. p. 249; p. 305).

The evidence gathered from the scene was analyzed by Intellegentics, a DNA testing laboratory. (App. p. 302; pp. 304-05). Dr. Daniel DeMiers analyzed the submitted evidence, including the strips of towel, the green jacket, the pieces of wire, the cigarette butts, and the knife. (App. pp. 304-05; p. 321). Petitioner's DNA was found to be present on the strips of towel, coat hanger wire, cigarette butts, and the green jacket. (App. pp. 314-17; p. 336; pp. 318-21). The knife revealed DNA from three different contributors from which the Petitioner was not excluded. (App. pp. 321-24). The DNA evidence obtained from the victim's body was analyzed by SLED forensic analyst Mary Boehm. (App. pp. 356-58; pp. 373-74). The DNA evidence from the victim was found to have conclusively matched the Petitioner's DNA profile from semen found on a rectal swab collected during the sexual-assault examination. (App. p. 364).

SLED analyst Mary Boehm was not available to testify at trial. (App. p. 14). In her place, the solicitor moved to admit the expert testimony of Amanda Webb, a DNA analyst with SLED who did not perform the analysis but who was a peer reviewer of Boehm's work on the case. (App. p. 14-15; p. 352; p. 354). Counsel had made a motion *in limine* and argued that Webb's testimony would impermissibly allow for the admission of Boehm's opinions without having Boehm present during trial. (App. pp. 15-16) The trial judge ruled Webb's expert testimony would be admissible if she were properly qualified and indicated that he would make a determination as to admissibility immediately before the testimony was presented to the jury. (App. pp. 16-18).

Following the court's ruling, trial counsel requested several proposed jury instructions regarding expert testimony admitted under similar circumstances in the United States Supreme Court decision in *Williams v. Illinois*, 567 U.S. 50 (2012). (App. pp. 17-18). After considering the proposed instructions, the trial judge determined those instructions would constitute a comment on the facts and indicated that he intended to charge the standard South Carolina jury instructions on expert testimony. (App. pp. 18-20). The trial judge then proceeded forward with the trial. (App. p. 20; pp. 89-103).

At trial, counsel did not renew his objection to Webb's testimony at the time that testimony was presented to the jury and without objection, Webb opined that the DNA profile taken from the rectal swab matched the Petitioner despite not having personally performed the analysis. (App. p. 352; pp. 355-56; p. 360; pp. 362-64).

Following Webb's testimony, both the State and Petitioner rested, and the trial judge conducted the charge conference. (App. p. 372; pp. 383-89). During the charge conference, trial counsel failed to renew his request for any jury instructions based on the suggested instructions

from the United States Supreme Court's decision in *Williams*. (App. pp. 383-89). The parties made their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (App. pp. 390-445). At the conclusion of the jury charge, the trial judge asked the parties if there were any exceptions to his instructions or any additional instructions desired, and trial counsel directly responded: "No, sir." (App. p. 445).

ARGUMENT

In order to prove trial counsel was ineffective, "the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance." *Thompson v. State*, ___ S.C. ___, 814 S.E.2d 487, 489 (2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989)).

To satisfy the deficiency prong, "the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citations omitted).

To satisfy the prejudice prong, an applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693)). "As the Supreme Court of the United States explained in *Strickland*, 'the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068-69, 80 L.Ed.2d at 698). "A reasonable probability is a

probability sufficient to undermine confidence in the outcome of the trial.” *Id.* (citing *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698)).

I. Counsel was Ineffective in Failing to Properly Handle the Issue of Third-Party DNA by Failing to Perform a Reasonable Investigation and by Failing to Retain an Independent DNA Expert

Trial counsel testified that he classified the DNA results into three categories: those items from which Petitioner’s DNA was excluded, those that contained a mixture of DNA, and those where Petitioner was a contributor. (App. pp.488-491) He further testified that he focused on the items of evidence that either matched Petitioner or contained a mixture of DNA. (App. pp. 488-491) Counsel did not retain an expert; rather, he testified that his strategy was simply to argue that there was at least a third contributor. (App. pp. 488-491) And other than introducing evidence of the prior relationship between Petitioner and the victim, counsel’s trial strategy did not include presenting any other evidence as to how Petitioner’s DNA would be on any of the items. (App. pp.488-491).

A criminal defense attorney has a duty to perform a reasonable investigation. *Ard* at 331, 642 S.E.2d at 597. “[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Id.* (internal quotes and citation omitted). Strategic decisions made by trial counsel must be based on a reasonable investigation to qualify as effective assistance. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 2541 (2003); *Von Dohlen v. State*, 360 S.C. 598, 607-08, 602 S.E.2d 738, 743 (2004). A Court may not rely on strategic decisions that “resemble[] more a post hoc rationalization of

counsel's conduct" rather than an actual strategy followed by counsel at the time of the trial. *Wiggins*, 539 U.S. at 526-27, 123 S. Ct. at 2538.

Here the evidence clearly establishes that trial counsel's conduct failed to qualify as effective assistance of counsel. Not only did counsel fail to perform a reasonable investigation but counsel performed no independent investigation at all. Despite trial counsel's strategy to focus on DNA evidence that either matched Petitioner or contained a mixture of DNA, no investigation was done into possible third party contributors. Counsel testified that even though Victor Maczyk's name appeared as a contributor in one of the mixtures, no further investigation was done into that contributor. (App. pp. 508-509). Counsel also admitted that the only independent investigation done was into the credibility of the victim. ("We actually did hire an investigator at one point to look into possible credibility issues on the victim's side, just different alternatives.") (App. pp.486-487). Moreover, trial counsel's explanation as to the decision in regards to hiring an expert to look at the DNA results fell far short of a well-defined trial strategy:

Q. Okay. As part of your trial strategy, did you choose to contest that was actually Mr. Morgan's DNA?

A. No.

Q. So part of your trial strategy was to acknowledge that it was, in fact, his DNA?

A. True, yes.

Q. Okay. So if you were – that trial strategy, does that affect your decision in regards to hiring an expert to look at the results?

A. Oh, yeah, that would.

Q. In what way?

A. Well, *there wouldn't necessarily be a reason to hire an expert if that was our strategy.*

(App. pp. 501-502)(emphasis added).

The State's unchallenged DNA evidence, both from the crime scene (Intelligenetics) and the examination of the victim (SLED laboratory) was the cornerstone of the prosecution's case. The failure of Petitioner's trial counsel to take every available opportunity to challenge, refute

and exclude this evidence resulted in the jury having virtually no option but to accept the State's evidence, and the testimony of its experts, without question or doubt. Conducting a reasonable investigation and retaining an independent DNA expert for the defense would have provided expertise and evidence from which there is a reasonable probability that the jury would have found reasonable doubt.

II. Counsel was Ineffective in Failing to Object to Expert Opinion Testimony of a SLED Analyst Who Did Not Personally Perform the DNA Analysis and in Failing to Renew His Request for a *Williams* Charge at the Close of Trial

The Post-Conviction Relief ("PCR") Court found that, although "it was error for trial counsel to fail to renew his objection to the SLED analyst's testimony at the time that testimony was presented to the jury," thereby satisfying the first prong of *Strickland*, Petitioner "failed to prove that he was prejudiced by such error because there is independent, overwhelming evidence of [Petitioner's] guilt such that it is not reasonably likely the result of the trial would have been different even if the SLED agent's testimony had been excluded." (App. p. 563).

However, "the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls*, 422 S.C. at 189, 810 S.E.2d at 844. Rather, "in determining whether the applicant has proven prejudice, the PCR Court should consider the specific impact counsel's error had on the outcome of the trial." *Id.* (See *Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). In addition, the PCR Court "should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* at 188, 810 S.E.2d at 843 (See generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength

of the government’s case ...,” and “we must consider the totality of the evidence before the jury.”)).

Although the PCR Court found that overwhelming evidence precluded a finding of prejudice, it did not make specific findings of whether the trial counsel’s error prejudiced Petitioner. *Smalls* at 195, 810 S.E.2d at 847; *See* Rule 52(a), SCRCF (“In all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law thereon....”); *Hall v. Catoe*, 360 S.C. 353, 364-65, 601 S.E.2d 335, 341 (2004) (repeating our previous directive that PCR courts comply with Rule 52(a) (quoting *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992))). As such, the PCR Court did not analyze how the errors affected the important findings in the case. Instead, the PCR Court simply relied on the testimony from Intelligenetics and the testimony from the victim in finding that the evidence was overwhelming. (App. p. 491). However, as discussed above, trial counsel was ineffective in his handling of the third party DNA and conducted no reasonable investigation prior to trial. Moreover, had trial counsel’s strategy actually been as stated—to focus on DNA evidence that either matched Petitioner or contained a mixture of DNA—it would have been vital to the defense of the case to exclude the testimony of the SLED expert, thereby eliminating the most conclusive DNA evidence.

Petitioner also was prejudiced by counsel’s failure to preserve the issues on appeal. In his appeal, Petitioner argued that the trial court erred in 1) allowing an analyst who reviewed a non-testifying analyst’s data to offer an expert opinion about DNA results and 2) failing to charge the jury with a limiting instruction about expert testimony. The Court of Appeals affirmed the trial court, finding that the issues were not preserved at trial. (App. p. 663). In

addition to counsel admitting that it was a mistake that he did not object to the SLED expert, counsel also admitted that he should have objected to the charge that the judge actually gave:

Q. And did you see any reason to object to the charge that the judge actually gave?

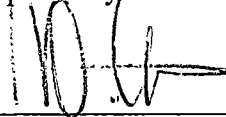
A. Well, I should have. I just – it just slipped my mind. It was Friday that we did the pretrial hearings and it was the next week, but – I didn't at the time, no.

(App. p. 505).

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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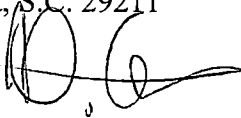
Steven Lee Morgan, Appellant/Petitioner,
v.
State of South Carolina, Respondent.

PROOF OF SERVICE

I do hereby certify that I have served the Petition for Writ of Certiorari, and Appendix in the above captioned case, on Respondent's counsel Lindsey A. McCallister, via facsimile, and First Class U.S. Mail, with the proper postage affixed thereto, to address listed below:

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