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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 № 2015-001459

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

vs.

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

RESPONDENT-PETITIONER'S REPLY TO PETITIONER-RESPONDENT'S BRIEF

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Question Presented

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?

The State appears to admit that trial counsel was ineffective in failing to properly cross-examine Tyra Rogers. The State cites *State v. Gracely,* 399 S.C. 363, 731 S.E.2d 880 (2012) for the proposition that the failure to permit cross-examination of a co-operating co-defendant as to their possible mandatory minimum sentence is reversible error.[1] This would establish as a matter of law that trial counsel was ineffective in failing to cross-examine Ms. Rogers. The law had been long established at the time of trial and re-affirmed after Mr. Hill's trial.

The State argues that "Hill is unable to demonstrate deficiency as trial counsel's performance was reasonable." Br. of Pet.-Resp. At 15. The State appears to argue that because trial counsel was able to *cross-examine* Ms. Rogers on other issues, he was not deficient in failing to cross-examine her as the time mandatory minimum she was facing. This was certainly not the holding of *Gracely* where this Court held the error was prejudicial even though trial counsel was able to fully cross-examine the witnesses on other issues related to their charges.

This Court stated in *Gracely*:

> To the extent our directive in *Brown* was unclear, the instant case provides an opportunity to clarify. The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury. *Id.* at 374-375, 731 S.E.2d at 885 (emphasis in original)

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[1] The trial judge in *Gracely* was the same trial judge in the present case. Trial counsel was correct when he testified he knew the judge. Knowing the judge did not make the issue any less reversible as *Gracely* proves.

The failure to properly cross-examine was error as this Court has repeatedly held.

The State further argues that "The PCR judge found trial counsel 'made a strategic decision not to ask Rogers about the potential sentence she faced.'" Br. of Pet.-Resp. at 13. In a footnote, the Post Conviction Relief judge did say trial counsel made a strategic decision not to cross examine Ms. Rogers as to her sentence. The Post Conviction Relief judge never articulated what the strategic reason was other than the trial judge did not permit such a question. Keeping helpful and credible testimony from the jury because the trial judge does not like it is hardly a strategic trial decision. Trial counsel agreed that if the trial judge ruled against him, a good appellate issue was created. App. at 280, ll 18-25. Voluntarily waiving a winning appellate issue is not a sound strategic decision. Trial strategy is based upon using sound judgement and not on failing to use sound judgment. A strategic decision is one used to advance the defense. That decision is made when there are competing alternatives. For example, the decision to have the defendant testify or not testify is often a strategic decision. A decision to introduce character evidence can be a strategic decision. It is a choice between alternatives. Neither the trial counsel nor the Post Conviction Relief judge ever articulated what the alternative decision was that made this a strategic decision. Nor does the Respondent in its brief.

The State has further argued that Mr. Hill was not prejudiced by this failure. The evidence against Mr. Gracely was far stronger than the evidence against Mr. Hill. Numerous individuals testified against Mr. Gracely. One witness was even permitted to acknowledge that was facing a mandatory minimum sentence of 25 years before the trial judge barred such further questioning. Here there is only one witness against Mr. Hill. As noted in the opening brief, numerous facts make Ms. Rogers an obvious person who possessed the drugs. The testimony

was that Mr. Hill had possession of the automobile after they arrived in Atlanta. Surely if Mr. Hill had possession of the automobile without Ms. Rogers for a period of time, he could have found a better hiding place than directly under her feet. Credibility was the sole issue in this case.

CONCLUSION

For the foregoing reasons this Court should hold trial counsel was ineffective in failing to cross examine Tyra Rogers as to her possible sentence, that the failure to so cross-examine the witness was prejudicial to Travell Hill and reverse the conviction.

August 8, 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 August 8, 2018, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Respondent-Petitioner's Reply Brief 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 8th day
0f August, 2018

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