STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

CARY GLENN RYALS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000570

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUES PRESENTED

1. Did the PCR court correctly grant a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney incorrectly filed the notice of appeal with the Solicitor's Office rather than the Clerk of Court and with the Court of Appeals
2. Did the PCR court err in not finding trial counsel ineffective for failing to investigate Petitioner's prior record timely by not confirming the three prior convictions for driving under suspension that formed the basis of his habitual traffic offender conviction?
3. Did the PCR court err in not finding trial counsel ineffective for not objecting to Petitioner Ryals proceeding to trial dressed in improper prison attire and for not requesting a continuance in order for counsel to provide proper street clothing for Ryals?

STATEMENT

In 2014, Officer Jon Ellwood worked with the Hanahan Police Department. On March 1, 2014, he observed a black Corvette which failed to signal a turn 100 feet before the turn but waited until he was making the turn. Officer Ellwood followed the vehicle and noticed it was traveling slower than the speed limit. App. 29, ll. 9 – App. 30, ll. 8.

As the officer followed the vehicle, he noticed that it drifted into the right fog lane "a little bit." The officer thought that that behavior was "consistent with impaired driving." At that point, Officer Ellwood made a traffic stop. App. 30, ll. 9 – 24. He identified Petitioner Ryals as the driver of the Corvette. When the officer asked the driver for his license, Ryals handed him someone else's driver's license. The passenger said he was the owner and provided the registration and insurance cards. According to Officer Ellwood, Petitioner Ryals could not provide a driver's license. App. 31, ll.1 – 25.

Officer David Kornahrens was called by Officer Ellwood to assist as Officer Kornahrens was state certified in DUI impairment and administering the field sobriety test. Officer Kornaherns found that Ryals was "not appreciably impaired to drive." App. 31, ll. 1 – 25; App. 42, ll. 1 -25; App. 44, ll. 1 – 13.

When Officer Ellwood checked with the Department of Motor Vehicles on Ryals' driver's license, the officer learned that Ryals' license was suspended. Ryals had not been able to produce a driver's license. App. 32, ll. 1 – 9. Officer Ellwood initially charged Ryals with driving under suspension (DUS). When they arrived at the police station, Officer Ellwood learned that Ryals had had several DUS charges and had already been deemed a habitual traffic offender. Therefore, Officer Ellwood charged Ryals with the habitual traffic offender instead of DUS. App. 34, ll. 1 – 25.

On May 12, 2015, the Berkeley County Grand Jury indicted Petitioner Ryals on the charge of habitual traffic offender. App. 210-App. 211. On June 1, 2015, Ryals proceeded to trial before the Honorable Kristi Lea Harrington and a jury. Ryals was represented by Frampton Durban, and the state was represented by Mason West and Kamila Szymczynska. App. 1.

During the trial, Officers Jon Ellwood and Officer David Kornahrens testified regarding their interaction with Petitioner Ryals on March 1, 2015, and his arrest for habitual traffic offender. App. 29, ll. 1 – App. 44, ll. 12. Then Marie Waring with the DMV testified concerning Ryals' driving record. She produced a copy of the official notice to Ryals dated May 20, 2009 of his being declared a habitual traffic offender. The notice listed three dates when he was charged with DUS. The notice informed him that he could not drive until the suspension period had ended which would have been June 19, 2014. The suspension period was listed as June 19, 2009 ending June 19, 2014. App. 44, ll. 23 – App. 47, ll. 25; Supp. App. 7.

Ms. Waring testified that the three dates of convictions for DUS for Ryals were:

Arrested 12/27/2007—Conviction 05/05/2009

Arrested 07/12/2008---Conviction 08/27/2008

Arrested 12/07/2007---Conviction 01/15/2008

App. 48, ll. 1 – 20.

Ms. Waring explained that the official notice was mailed certified to his home address. She had a document showing Ryals signed for the mail on May 22, 2009.The receipt was received by DMV on May 26, 2009. App. 49, ll. 1 – App. 52, ll. ; Supp App. 15.

At the close of the state's evidence, defense counsel made a motion for a directed verdict based on a lack of probable cause for the traffic stop. Counsel argued that the traffic stop was not legal as there was no reason to stop Ryals initially. If he had not been stopped, the police would

not have "found any of this that was in his background." Counsel argued that the police could not stop someone based on speculation. App. 53, ll. 3 – 15. The judge denied the motion for a directed verdict. App. 54, ll. 1 – 25.

Ryals then testified that he had been employed with the State Port Authority in Charleston for seventeen years. App. 61, ll. 10 – 25. In March 2014 when he was stopped, he did not know that his driver's license had been suspended. He explained that he was charged in 2010 with DUS but that charge was dismissed. Then he was stopped after that and was initially charged with DUS. Then the officers came back and told him he was not charged with DUS. Therefore, he believed that he was not under suspension. App. 62, l. 1 – App. 64, ll. 6.

Ryals testified that he did not receive the certified notice from DMV informing him of his habitual traffic offender status. He denied signing the certified signature card. He said if he had received the notice, he would have appealed. App. 64, ll. 7 – App. 66, ll. 19.

Before Ryals testified, the judge told Ryals that he was going to authorize Mr. Hamilton to remove the leg irons from Ryals. The judge asked Ryals if the judge had any cause for concern.

Ryals responded: "I will comply with everything, ma'am. I wish I was dressed better than I am presently." The judge then said to bring in the jury. App. 60, ll. 16 – App. 61, ll. 6. Defense counsel renewed his directed verdict motion at the close of the evidence. App. 81, ll. 1 – 25.

The jury returned a verdict of guilty as indicted. App. 102, ll. 1 – 23. The judge sentenced Ryals to five years in prison. Because of the conviction for habitual traffic offender, the judge also revoked in full the ten-year probationary sentence Ryals was under for a conviction for

assault and battery of a high and aggravated nature on January 28, 2013. App. 106, ll. 1 – App. 111, ll. 21.

Ryals did not appeal his conviction, nor his sentence nor his probation revocation. App. 196.

On January 28, 2016, Petitioner Ryals filed an application for post-conviction relief (PCR). The state filed a return on June 13, 2016. App. 195. An evidentiary hearing was held on December 4, 2017 before the Honorable Michael G. Nettles. Ryals was represented by Rodney Davis, and the state was represented by Julie Coleman. App. 134.

The state told the court initially that they had been unable to reach trial counsel so he would be unavailable to testify.[1] The state also informed the court that some of the claims that Petitioner Ryals was alleging in his PCR application included the claim that trial counsel was ineffective for failing to investigate his past record, and counsel's failure to object to the improper attire. App. 137, 1 – 23.

PCR counsel told the court in the beginning that trial counsel was inadequately prepared for this trial. Trial counsel did not investigate the three underlying offenses that were the basis for the habitual traffic offender charge. App. 139, ll. 1 – 6. Counsel informed the court that trial counsel improperly filed the notice of appeal with the solicitor's office so Ryals did not receive an appeal from his trial. The state said they would consent if the testimony did show that. The judge found that Ryals had the intent to appeal so he was granting a belated appeal. App. 140, ll. 1 – App. 142, ll. 3.

Petitioner Ryals then testified that he did not hire Attorney Durban to represent him on this charge but was hired only to have a bench warrant lifted. App. 143, ll. 11 – App. 150, ll. 16.

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[1] Trial counsel, Frampton Durban, Jr., was suspended from the practice of law on June 24, 2016 by order of the Supreme Court. App. 187-App. 188.

Then on May 29, 2015, he was brought to court in his prison clothes and appeared before Judge Harrington. He asked for another lawyer but Judge Harrington denied his request. Then his trial began June 1, 2015. He was brought to trial in his jail clothes. His attorney did not provide any other clothing for him. App. 151, ll. 3 – App. 157, ll. 25.

Ryals said that he did not see his driving record until he was convicted so he did not know what three offenses the state was relying on for the habitual traffic offender charge. His trial counsel was suspended from the practice of law on June 24, 2016. App. 157, ll. 1 – 25. Ryals hired another attorney to investigate his record which she brought to him. Ryals then did some investigation of his own. App. 158, ll.1 – 17. He learned that there were charges from an accident he was allegedly involved win but that was false. He was not in an accident on August 3, 2007.

The attorney who brought his driving record checked with SLED concerning the arrest on July 12, 2008 as Ryals claimed that was false. The attorney wrote to SLED and determined that they did not have an arrest for Ryals on July 12, 2008 which was one of the three offenses the state used. App. 164, ll. 9 – App. 167, ll. 25; App. 193 -App. 194.

PCR counsel argued that the probation revocation was based on Ryals' conviction for habitual traffic offender. App. 176, ll. 20 -25.

The PCR judge issued an order on March 1, 2018 denying Petitioner Ryals' PCR application and dismissing it with prejudice. The judge did grant Ryals a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 209.

The judge found that trial counsel was not ineffective in any regard. The order provided that while evidence indicated that trial counsel was suspended from the practice of law,

Petitioner Ryals did not prove that trial counsel's suspension was related in any way to Ryals' trial. App. 199 – App. 200.

The PCR judge found that Ryals failed to prove that trial counsel was ineffective by not investigating Ryals' prior convictions that were the basis of his habitual traffic offender conviction. The order provided that Ryals challenged the prior convictions during his testimony at trial. However, the judge wrote that the convictions were valid. The judge also found Ryals' testimony on this issue to not be credible. App. 200 – App. 201. The judge wrote that even if the evidence presented by Ryals had been credible, he waived his right to challenge them by not appealing when he received the notice. App. 202.

On the issue of improper attire when trial counsel failed to object to the trial going forward with Ryals dressed in prison attire, the PCR judge found that although trial counsel "may have been deficient on this ground, Ryals could show no prejudice resulting from trial counsel's failure to object. The judge relied on the case of Humbert v. State, 345 S.C. 332, 337-338, 548 S.E.2d 862 (2001) where the Supreme Court held that "it was generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing; however the court found there was no reasonable probability the outcome of his trial would have been different." App. 204- App. 205.

Ryals' PCR attorney filed a notice of appeal. This petition follows accompanied by an Anders Brief of Appellant Pursuant to White v. State.

ARGUMENT

I

The PCR court correctly granted a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney incorrectly filed the notice of appeal with the Solicitor's Office rather than the Clerk of Court and the Court of Appeals.

Ryals' attorney filed a notice of appeal with the solicitor's office instead of with the Clerk of Court and the Court of Appeals. PCR counsel argued that the appeal was never perfected and Petitioner Ryals wanted an appeal. The state objected to the PCR application being amended to include a belated appeal but would consent depending on the testimony. App. 140, ll. 1 - 22. The judge found that if any desire to appeal was shown, then he was going to grant a belated appeal. App. 140, ll. 23 – App. 142, ll. 3.

The PCR judge issued an order where he found that Ryals did not knowingly and voluntarily waive his right to a direct appeal and granted him the right to a belated appeal according to White v. State, 263 S.C. 110, 108, S.E.2d 35 (1974). App. 208 – App. 209.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The order of the PCR court granting the belated appeal should be affirmed.

ARGUMENT

II

The PCR court erred in not finding trial counsel ineffective for failing to investigate Petitioner's prior record timely by not confirming the three prior convictions for driving under suspension that formed the basis of his habitual traffic offender conviction.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court found that trial counsel was ineffective because a criminal defense attorney has a duty to investigate, but this duty was limited to reasonable investigation. The Court defined a reasonable investigation at a minimum has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court's denial of Lounds' PCR application and remanded for a new trial because trial counsel was found to be ineffective for not adequately preparing for trial by not sufficiently investigating the case.

Trial counsel was ineffective for not investigating the three prior conviction used as the basis for the habitual traffic offender charge. The fact that Ryals had to obtain another attorney in order to get a copy of his driving record indicated that trial counsel was not prepared. The fact that SLED had no record of an arrest of Ryals on July 12, 2008 was indicative that trial counsel had done no investigation. Counsel should have investigated to ensure that the DMV records were accurate even if SLED did not keep a record of the driving offense. It was a red flag that something could have been wrong with Ryals' record at DMV.

Although the accident in August 2007, was not one of the convictions relied on by the state, the fact, as shown by the exhibit, that that charge was in error, created a reasonable probability that there were other errors in the DMV record.

ARGUMENT

III

The PCR court erred in not finding trial counsel ineffective for not objecting to Petitioner Ryals proceeding to trial dressed in improper prison attire and for not requesting a continuance in order for counsel to provide proper street clothing for Ryals.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

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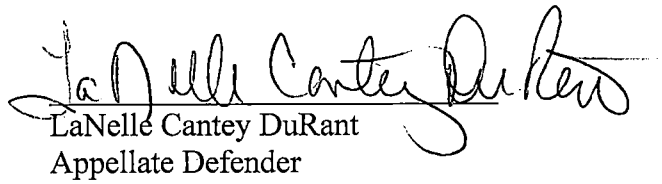
The PCR judge relied on Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) for his decision on improper attire of prison clothing during the trial. The Supreme Court held in Humbert that "it was generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing; however, the court found there was no reasonable probability the outcome of his trial would have been different." However, Humbert's case is distinguished from Ryals' case where the sheriff in Humbert's case tried to get Humbert to wear his "non-jail" clothes to trial but he refused. Humbert did not want to wear his street clothes because they were the same clothes where the store clerk identified him as the robber. Then the sheriff tried to get Humbert to turn the jail clothes inside out so the jail writing would not show but he refused that also.

Ryals' trial attorney was ineffective for not obtaining street clothes initially for Ryals to wear for the trial. Then he was ineffective for not asking for a short continuance in order to obtain street clothes for Ryals. This was prejudicial to Ryals because the jury developed the visual image of Ryals being a prisoner and criminal. Then he was further prejudiced because he testified wearing the prison clothing.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded for a new trial on Issues II and III. The order of the PCR court granting a belated appeal should be affirmed on Issue I.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

CARY GLENN RYALS,

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 in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Cary Glenn Ryals, #364293, at Trenton Correctional Institution, 84 Greenhouse Rd, Trenton, SC 29847, this 24th day of September, 2018.

LaNelle Cantey DuRant
Appellate Defender

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

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

ATTORNEY FOR PETITIONER