THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2018-001084

DaQwan Johnson #351891,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. **Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was not provided or timely provided discovery?**

2. **Did the Court err in not granting Post-Conviction Relief based upon the fact that trial counsel was ineffective for not obtaining known discovery prior to trial?**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the February 2011 term of the Court of General Sessions for Richland County for murder (2011-GS-40-0863) and attempted murder (2012-GS-40-0885). Petitioner was represented by Gregory B. Collins, Esq. and John C. Newton, Esq. Petitioner proceeded to trial on July 26, July 30, August 3 and August 8, 2012, before the Honorable R. Knox McMahon and a jury. He was convicted as indicted. Judge McMahon sentenced Petitioner to a term of fifty (50) years' imprisonment for murder and a term of thirty (30) years' for attempted murder. These sentences were to be served concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Robert M. Dudek, Esq. The Petitioner raised the following two issues:

> The Court erred by ruling the case would have to go to trial where the defense objected to the state controlled docket, which was held unconstitutional in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), and where the defense objected to the refusal to grant a continuance given the complexity of the case and the number of witnesses involved.
>
> The Court erred by ruling the defense opened the door to evidence Petitioner was in a gang simply by agreeing in its opening statement that, while the murder committed by others may have been gang related Petitioner was not at the scene of the shooting, and evidence Petitioner was in a gang constituted highly prejudicial impermissible bad character evidence.

The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Johnson, No. 2015-UP-192 (filed April 8, 2015). The Remittitur was issued on April 29, 2015.

An application for Post Conviction Relief was filed on August 25, 2015 by Petitioner. Respondent submitted its Return on December 3, 2015. An evidentiary hearing was held on Monday, March 19, 2018 at the Richland County Courthouse. Petitioner was present at the hearing and represented by Tommy Thomas, Esq. Assistant Attorney General Jessica E. Kinard, Esq., represented the State. Applicant testified on his behalf. Gregory Collins, Esq. was also present and testified. At the conclusion of the PCR trial, the Petitioner filed a Post Trial Brief (App. p. 1212) An Order of Dismissal was filed May 14, 2018. This Appeal follows:

STATEMENT OF FACTS

Petitioner filed a Post-Conviction Relief Application on August 25, 2015 alleging that the Trial Counsel was ineffective for the following additional reasons:

1. Ineffective Assistance of Trial Counsel in that:
    a. Trial Counsel failed to put the State's case through the adversarial process.
    b. Trial Counsel failed to investigate.
2. Ineffective Assistance of Appellate Counsel, in that;
    a. Appellate counsel denied applicant the right to fair process and the opportunity to obtain an adjudication on the merits of his voluntary manslaughter request that was denied by the trial courts.
3. Due process Violation of the 5th and 14th Amendments, in that:
    a. Appellate Counsel denied applicant effective assistance in violation of the South Carolina Constitution Article one Section's three and fourteen and the

United States Constitution's sixth and fourteenth amendments. The issue of the Brady violation was provided to the Attorney General prior to trial.

The Petitioner was charged with a crime that occurred at Gable Oaks Apartments on June 19, 2010. The Petitioner was charged with Murder and Attempted Murder. He went to trial by Jury and was found guilty of both of these charges. The State argued that this crime was related to gang violence (App. p. 1135, lines 4) An initial suspect was identified by the name of O.B. Williams. A warrant was sworn out for his arrest for Murder in this case. (App. p. 1135, lines 15-18) The warrant against Mr. Williams was eventually dismissed, however, there were other individuals that were arrested (App. p., lines 19-24) including the Petitioner.

Indirectly related to this case, there was another shooting. This shooting occurred at the Studio 54 night club after the incident at Gable Oaks. This shooting was allegedly in retaliation for the Gable Oaks shooting. (App. p.1136, lines 1-7) Gable Oaks and Studio 54 incidents were investigated by different law enforcement agencies which created a difficulty in obtaining discovery. (App. p. 1136, lines 11-25)

The theory of defense in this case was that the co-defendants who had testified in this case, had an incentive to lie in an attempt to avoid incarceration. Also that they were covering for the real gang leader that was involved, Mr. O.B. Williams. (App. p. 1138, lines 1-17) An alibi defense was presented on behalf of Petitioner.

There was a Pre-Trial Motion regarding a continuance. Just prior to trial, there emerged evidence of DNA swabs of the shell casings. This evidence had not been provided. (App. p. 1141, lines 1-8) There was also an ongoing Federal Investigation that included some of the co-defendants. Trial Counsel was concerned that exculpatory evidence could have been found in recorded phone calls as a result of this Federal Investigation. (App. p. 1143, lines 3-20)

Trial Counsel testified that despite his Rule 5 and Brady Motions (App. p. 1148, lines 3) he was only sporadically given discovery and actually was given some discovery the day before trial. (App. p. 1148, lines 7-9) He states that he was unable to view certain evidence even though he was given the opportunity to view this evidence. He had to decline to review the evidence because the custodian of the evidence was not present, nor was any other person from the Solicitor's Office present during this process (App. p.1149, lines 1-3) That it was only after the trial started that he was given the opportunity to review this evidence. (App. p. 1149, lines 4-9) Trial Counsel also testified that he was never provided any information from the law enforcement radio logs, nor information from the Crime Stoppers Report. (App. p.1150-1151)

The Trial Court expressed concern about why Trial Counsel had not handled all of the DNA evidence before hand. Counsel testified that he did not have enough time to have this done. (App. p. 1156, lines 12-15)

At trial, trial counsel became aware that the State had compiled a weak DNA profile taken off of the shell casings. Law enforcement was able to compare this with a Local CODIS data base. This had never been disclosed to Defense Counsel. It was divulged that Mr. O.B. Williams, who was the suspected shooter, was on the local CODIS data base and that he was excluded from this weak DNA profile. (App. p. 1159, lines 23-25, App. p. 1160, lines 1-6)

In addition, counsel testified that there were problems with the phone records that were provided to him in that he was not provided with a key to the abbreviations on the recording spread sheet, that this made it extremely difficult for Defense Counsel to evaluate these records. (App. p. 1163, lines 1-9) Counsel testified that he made two Motions for a mistrial, which were denied by the Court. Also, counsel testified that he did not ask the Court to charge Voluntary

Manslaughter. That he felt that they had a pretty strong defense and that he thought that the correct result would be a plea of not guilty. (App. p. 1170, lines 7-25)

Defense Counsel made two Motions for mistrial. The first one revolved around the state's failure to provide information about DNA in the local CODIS system. (App. pp. 574-575) The Second Motion was regarding testimony of corroborating statements from Terrance Patterson and Brian Campbell. While the Court gave a curative charge on the second Motion, the damage was already done. The Court noted that counsel was also late in making his second Motion for Mistrial. (App. pp. 766-768)

ARGUMENT 1

Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was not provided or timely provided discovery?

The Lower Court finds that Petitioner is attempting to frame a claim of Brady violation as a claim of ineffective assistance of counsel. And that the Petitioner made no allegations of prosecutorial misconduct. The Lower Court goes further to rule that in the alternative that counsel was not ineffective.

The Petitioner asserts that the lack of Discovery material was due to failure of the State to provide this information or to provide it before trial. There is no evidence that this was intentionally done, arising to Prosecutorial Misconduct. Trial Counsel testified that he did not think that it was intentional. However, it was done nevertheless. This prejudiced the Petitioner and deprived him of his Constitutional Rights and a fair trial.

This lack of Discovery Information is a breach of the requirements of Brady and Rule 5 requests. It is also ineffective assistance of counsel in failure to take action to assure that Discovery information or lack thereof was acted upon.

In evaluating post-trial Brady claims, the Petitioner must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F. 2d 1387 (10th Cir. 1988). The Brady disclosure rule requires the prosecution to provide to the Defendant any evidence in the prosecutions' possession that may be favorable to the accused and material to guilty or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E. 2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 W.S. 667, 676, 105 S.Ct. 3375 (1985). In determining whether a Brady violation occurred, the Court must not view the suppressed evidence in isolation but instead must review it in light of the entire record. Brady Supra.

"Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark v. State, 315 S.C. 385, 434 S.E. 2d 266 (1993). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Bagley, 473 U.S. at 678, 105 S.Ct. at 3381.

Defense Counsel testified to at least eight (8) instances of not receiving discovery or receiving discovery at the last moment. Defense counsel further testified that this failure to provide discovery or to provide in a timely matter deprived the Petitioner to his constitutional rights to a fair trial and was prejudicial. Counsel enumerated the following:

- Failure to disclose testing on swabs for DNA. (App. p. 59, lines 13-25 and App. p. 74, lines 1-12)

- Failure to provide meaningful opportunity to review evidence at Sheriff's Department.
- Failure to provide information regarding suspect detained at the scene.
- Failure to provide radio logs. (App. p. 69, lines 19-24)
- Failure to provide Crime Stoppers Report. (App. p. 70, lines 1-8)
- Learned about DNA the morning of the trial and was unable to do independent testing. (App. p. 283, lines 1-12)
- Failure to provide the key pages for phone records. (App. p. 709, lines 1-6) (App. p. 360, lines 1-5)
- Failure to inform Defense Counsel of DNA profile in local CODIS system.

Clearly this Brady and Rule 5 violation meets the criteria that evidence was suppressed, would have been favorable to the accused and was material. The Petitioner does not have to show prosecutorial misconduct to establish a Brady and/or Rule 5 violation. Therefore, the PCR Court was in error in its finding and decision. The Petitioner was prejudiced by the State's actions.

ARGUMENT 2

Did the Court err in not granting Post-Conviction Relief based upon the fact that trial counsel was ineffective for not obtaining known discovery prior to trial?

The PCR Court found that counsel cannot be incompetent for failing to receive materials from Prosecution that they had no reason to know existed. Further, the Court finds that Counsel's performance was not deficient in any way. That Counsel took action to ensure that he had received and reviewed all the discovery that he knew existed before trial. Petitioner would argue that the Lower Court erred in this decision.

Clearly, counsel was ineffective for failure to either obtain or follow through on evidence that he had knowledge of, or should have known existed. The Trial Court actually asked (App. p. 283, lines 1-12) why the DNA issues had not been resolved prior to trial. Counsel admits that he had at least a couple of weeks to deal with the DNA report and he did not have enough time to receive a report back from SLED. However, there was no indication on the part of trial counsel that any attempt was made to obtain analysis of any DNA material provided. (App. p. 1156, lines 7-22)

In addition, trial counsel testified at the PCR hearing that he would go through the Discovery material and he would see reference to material that had not been turned over. However, there appears that no actions were taken to obtain this discovery other than possibly a request for this material. It is clear from Trial Counsel's testimony that he was aware of its existence. No Motions to produce were made.

Counsel testified at Post Conviction that he had received a ballistics report from David Collins. While DNA testing was not in his report, apparently the casings were swabbed for DNA. He received this information and his first Motion for Continuance was based upon the fact that he had not been provided this information. However, there is no indication that any action was taken to process this DNA information in preparation for the defense. (App. p.1141, lines 5-15)

Counsel also testified that he was concerned about an ongoing Federal Investigation. That this investigation could have provided information that would have been helpful to the Defendant. In his past knowledge, he believed that there could exist wire tapped phone conversations. He believed it was possible that this information might contain information about this shooting and who was involved. (App. p. 18, lines 23-25) Trial Counsel testified that

access to this information could have produced exculpatory evidence as far as some of the players taking part in the shooting. He stated that he never did obtain that information. (App. p. 1143, lines 9-20)

Trial Counsel testified that after he was granted a continuance by Judge McMahan he received reports from DNA testing of the swabs that were in question. (App. p. 1145, lines 9-14) He stated that the Defense learned from the report that suspects had been excluded from a weak DNA profile taken off of shell casings and full ammunition at the scene. He stated that this was extremely important to the case, especially since they were alleging that the testifying Co-Defendant's were coerced into testifying and that they were protecting someone else. (App.p. 1145, lines 19-25) However, it appears that he did not take the necessary steps to process and analyze this information prior to trial.

In addition, Trial Counsel testified that he was unaware that Richland County had a CODIS system and that the defense potential shooter had been ruled out by the DNA and the CODIS process. Petitioner would contend that it was ineffective for counsel not to have investigated on his own through Richland County to determine whether such a system existed and whether or not a potential suspect was in this system. (App. p. 1146, lines 1-9)

In addition, Counsel was provided an opportunity to review the evidence, but elected not to do so. His concern was that there was no custodial of record present. However, he was still given the opportunity to review this evidence and elected not to do so. (App. p. 1148, lines 17-24) As a result of counsel's election not to review the evidence, he stated that he was only able to inspect the evidence after the trial started. (App. p. 1149, lines 1-9)

Trial Counsel also discusses his attempt to obtain radio logs. He indicated that this was important because he wanted to find out if certain suspects were handcuffed or detained at the

scene. That information can be left out of written incident reports and that it is possible that important information can be gleaned from the actual radio logs. Counsel, however, made no independent attempt to obtain these logs. He knew they were in existence and was ineffective for not obtaining these records prior to trial. (App. p. 1150, lines 12-21)

Trial Counsel was also aware of the Crime Stoppers report. (App. p. 1151, lines 5-9) (App. p. 70, lines 1-8 and App. p. 71, lines 1-4) He believed that for good cause, he could uncover any information from the crime stopper tip and was attempting to receive a print out of everyone who called into Crime Stoppers. He testified that he was actually given one crime stopper report. He stated that at Trial he received possibly one more call. (App. p. 1151, lines 10-25)

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 2064 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel's performance

was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

Trial Counsel testified that he came on board this case early on. (App. p. 1134 lines 7-9) The case was called for trial on July 26, 2012. The Petitioner was arrested on June 19, 2010. Trial Counsel testified that he was getting bombarded with hundreds of pages of documents. That the discovery issues impacted his ability to represent the Petitioner (App. p. 1172 , lines 7-15)

He testified that this problem was prejudicial to the Petitioner. (App. p. 1172, line 16-17) That this prejudice reached so far as to interfere with the Petitioner's Constitutional rights to a fair trial. (App. p. 1173, line 3-8)

CONCLUSION

That the Lower Court's decision be reversed and the Petitioner be granted a new trial.

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