STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD MAURICE DUNN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001994

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed to object to the admission of Petitioner's DNA which was held in an illegal database operated by the Richland County Sheriff's Department, where a DNA match between DNA found on a "washrag" at the scene of the incident and Petitioner's illegally retained DNA was the only way Petitioner became a suspect and all of the evidence that followed stemmed from that illegal DNA match?

STATEMENT

During the July 2011 term, the Richland County Grand Jury indicted Petitioner for armed robbery, kidnapping, and burglary in the first degree. App. 687 – 692.

On May 21 – 24, 2012, Petitioner proceeded to trial before the Honorable G. Thomas Cooper, and a jury. App. 1. Victor Li and Dean O'Neil represented Petitioner. Id. Margaret Fent and Foster Matthews represented the state. Id.

Petitioner was found guilty of kidnapping, armed robbery, and burglary in the first degree, but not guilty of criminal sexual conduct in the first degree. App. 521, l. 16 – 522, l. 22. Judge Cooper sentenced Petitioner to thirty years' imprisonment. App. 546, ll. 11 – 18.

Petitioner argued on appeal that the trial court erred when it refused to suppress all evidence flowing from the retention and usage of Petitioner's DNA, which was taken while he was a juvenile, maintained in an illegal database, and used outside of the consent given. App. 548 – 563[1].

The Court of Appeals affirmed Petitioner's conviction because the issues raised on appeal were not preserved for judicial review holding that they were not raised before the trial court. State v. Dunn, No. 2014-UP-249 (Ct. App. 2014).

On January 16, 2015, Petitioner filed an application for post-conviction relief (PCR) application where he alleged that trial counsel was ineffective for failing to argue that the DNA database maintained by the Richland County Sheriff's Department was illegal. App. 605 – 618; S.C. Code Ann. § 23-3-640. The state filed its Return on July 8, 2015. App. 619 – 623.

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[1] Plea counsel O'Neil stated that he only challenged the admission of Petitioner's DNA on the grounds that the retention of the DNA exceeded the scope of consent that Petitioner gave. App. 651, ll. 19 – 22.

Petitioner's PCR hearing was held on July 11, 2016 before the Honorable D. Craig Brown. App. 625. Jonathon Waller represented Petitioner. Id. Jessica Kinard represented the state. Id.

In an order filed on October 9, 2018, Judge Brown denied Petitioner's relief ruling, "trial counsel could not be ineffective, even if [Petitioner's] challenge to the legality of the Richland County Sheriff Office's DNA database was adequately preserved for review it is without merit." App. 666 – 686.

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel when he failed to object to the admission of Petitioner's DNA which was held in an illegal database operated by the Richland County Sheriff's Department, where a DNA match between DNA found on a "washrag" at the scene of the incident and Petitioner's illegally retained DNA was the only way Petitioner became a suspect and all of the evidence that followed stemmed from that illegal DNA match.

Relevant Facts

Petitioner was a suspect in an unrelated burglary committed on September 20, 2010, over six months prior to the incident in question. App. 85, l. 6 – 86, l. 16. The Richland County Sheriff's Office told Petitioner at that time that it needed a sample of his DNA to compare it to the DNA they recovered from the scene of the September 2010 burglary. App. 87, ll. 2 – 7. Petitioner consented to give his DNA to the Sheriff's office specifically to exonerate him as a suspect in that September 2010 investigation. App. 97, ll. 4 – 15; App. 630, l. 23 – 631, l. 4.

That DNA was stored in an illegal database maintained by the Richland County Sheriff's Office that contravened S.C. Code Ann. § 23-3-640 (D)'s requirements regulating the creation and maintenance of DNA databases in South Carolina. App. 92, ll. 15 – 25. It is also worthwhile to note that Petitioner's DNA did not match the DNA found at the scene of the September 2010 burglary and he was exonerated as a suspect in that case. App. 91, ll. 22 – 25.

Petitioner was a minor at the time and his mother was with him at the sheriff's office to validate Petitioner's consent. App. 93, ll. 1 - 2. The Sheriff admitted that no one told Petitioner that his DNA would be stored in a database. App. 92, ll. 15 – 25. The DNA consent form signed by Petitioner had no warning that the Sheriff could use his DNA without limit. App. 98, l. 7 –

99, l. 16. The Sheriff's form also did not notify Petitioner that his DNA would be maintained in the Sheriff's own database or any other database. App. 97, ll. 4 – 15.

However, in spite of Petitioner's expectation that the DNA he gave would only be used into the September 2010 burglary investigation, *his DNA was stored in an illegal database operated by the Richland County Sheriff's Office* and used in an indeterminate number of subsequent investigations. App. 92, ll. 15 – 25. The current charges against Petitioner derived entirely from the DNA found at the scene of the present incident matching the DNA held without Petitioner's consent in an illegal database maintained by the Richland County Sheriff's Office.

The state alleged the facts of the present charges as follows: On May 28, 2011, Indira Lonsdale, the complaining witness, was awoken in the early hours of the morning by a "bang." App. 199, l. 1 – 200, l. 2. She got up to investigate the noise and someone accosted her from behind. App. 200, ll. 3 – 11. Lonsdale never saw the person's face. App. 200, ll. 14 – 21.

The intruder then took Lonsdale to the bedroom and bent her over the bed. App. 200, l. 22 – 201, l. 2. Lonsdale was restrained and the intruder, "puts his penis between [her] legs," but, "he didn't penetrate [her]." App. 203, ll. 11 – 21. The intruder then had Lonsdale clean herself of with a "washrag." App. 204, ll. 2 – 25. Lonsdale never was able to see the intruder. Id.

The intruder's seminal fluid was found on the "washrag" inside Lonsdale's home. App. 343, l. 3 – 344, l. 18. Law enforcement performed DNA testing on the "washrag" and found a match to Petitioner's DNA held in the Richland County Sheriff Office's illegal DNA database. Id.; App. 92, ll. 15 – 25.

When the arresting officers approached Petitioner, they told him right away that they had a DNA match; however, they neglected to say the DNA was retained in an illegal database and without Petitioner's consent. App. 30, l. 20 – 31, l. 5. The only reason Petitioner gave the police

a strange, yet inculpatory, statement concerning his involvement in the present incident was because they told him they had a DNA match. App. 100, ll. 21 – 24.

Petitioner filed a pretrial motion to suppress the DNA evidence and any evidence that flowed from it. App. 24, ll. 8 – 23. Petitioner also argued in the motion that the retention of his DNA sample exceeded the scope of any alleged consent. App. 101, l. 7 – 110, l. 9; App. 121, l. 5 – 123, l. 4.

Petitioner testified at the pretrial hearing. App. 56, ll. 21. Petitioner testified that no one told him that his DNA profile would be entered and maintained in the Richland County Sheriff Office's DNA lab in perpetuity. App. 97, ll. 6 – 9. Had Petitioner been told his DNA would be stored in a DNA database, he would not have given consent for it to be taken. App. 97, ll. 13 – 15. Investigator John Carwell specifically told Petitioner that he was going to use the swab to compare it to the 2010 burglary. App. 99, ll. 21 – 24. Petitioner testified that the only reason he gave consent for his DNA to be taken was to compare it to the samples obtained from the scene of the 2010 burglary. App. 100, ll. 8 – 14.

However, plea counsel failed to argue that Petitioner's DNA was retained illegally because it was held by the Richland County Sheriff's department, in direct violation of the statute. App. 651, ll. 14 – 18; S.C. Code Ann. § 23-3-640.

Judge Cooper stated he would leave the DNA issue "for another court to decide," and ruled that the DNA results were admissible. App. 127, ll. 11 – 21. Petitioner was convicted of kidnapping, armed robbery, and burglary in the first degree; however, he was acquitted of criminal sexual conduct in the first degree. App. 521, ll. 16 – 17.

Petitioner through, Appellate Defender David Alexander, argued that the trial court erred when it refused to suppress all evidence flowing from the retention and usage of Petitioner's

DNA, which was taken while he was a juvenile, maintained in an illegal database, and used outside the scope of his consent. App. 548 – 563.

The Court of Appeals affirmed Petitioner's conviction in part because the argument that the DNA database was illegal was not preserved for judicial review as it was not raised before the trial court. State v. Dunn, No. 2014-UP-249 (Ct. App. 2014).

Petitioner testified at PCR that he was under the impression he was only consenting for his DNA to be limited to the September 2010 investigation. App. 629, l. 19 – 630, l. 13. Petitioner came to this understanding because of the representations from the investigating officer that the DNA could help exonerate him in the 2010 investigation. Id. Akin to what every other layperson's understanding would have been, Petitioner thought that that meant his DNA would not be used outside of the scope of the 2010 investigation. App. 630, l. 23 – 631, l. 4.

Trial counsel O'Neil testified as well. App. 646, l. 13. O'Neil stated that the entire case against Petitioner flowed from the DNA match at the illegal Richland County Sheriff's Office database. App. 649, ll. 8 – 18. Trial counsel explained, "It's my understanding that [Sheriff], essentially, took samples from individuals if the individual gave consent in a particular case *and they kept it and did not destroy it.* App. 649, l. 23 – 650, l. 4. (emphasis added)

O'Neil admitted that he did not raise the argument that the Richland County Sheriff's Office kept a database that was illegal because it fell outside of the state DNA statute. App. 651, l. 14 – 18; S.C. Code Ann. § 23-3-640(D). He explained that he argued at the lower level that all of the evidence should be suppressed because it stemmed from the DNA match and that Petitioner was not arrested until after the DNA match. App. 661, l. 23 – 662, l. 7.

Although trial counsel admitted he did not raise the argument that the Richland County Sheriff Office's database was illegal, and the Court of Appeals held that that argument was not

preserved, the state curiously argued at PCR that, "these arguments have been dealt with at trial, as well as through the appellate process." App. 663, l. 14 – 664, l. 6. She contended that, "It's not this court's job to decide the legality of the DNA database." Id.

In an order filed on October 9, 2018, Judge Brown denied Petitioner's PCR allegations because, "trial counsel could not be ineffective, even if [Petitioner's] challenge to the legality of the Sheriff's DNA database was adequately preserved for review it is without merit." App. 666 – 686.

Discussion

The Richland County Sheriff's Department kept its own DNA database where it illegally retained Petitioner's DNA, which was the basis for the entirety of the case against him. Accordingly, trial counsel provided ineffective assistance of counsel when he failed to argue during the suppression hearing, that Petitioner's DNA and the evidence that flowed from it should be suppressed because the Richland County Sheriff Office's DNA database was illegal. App. 651, ll. 14 - 18; S.C. Code Ann. § 23-3-640.

S.C. Code Ann. § 23-3-640 (D) states, "SLED *must* store DNA samples. The samples are confidential and must remain in the custody of SLED or a private laboratory designated by SLED if the laboratory's standards for confidentiality and security are at least as stringent as those of SLED." Id. The Richland County Sheriff Office's DNA database maintained in Richland county was in direct violation to the DNA database statute as it was not designated by SLED to operate a DNA database. Id.

The DNA Database statute provides comprehensive regulation of the retention of citizens' DNA profiles that preempts any attempt by local governments to create their own databases. Local authorities are preempted by state law from acting in areas that are

comprehensively regulated by the state. See Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 486 n.2, 511 S.E.2d 361, 363 n.2 (1999) (noting that state regulation of motorized watercraft on navigable waters preempted any local encroachment in this area).

Notably, the Attorney General agreed with this conclusion. See Attorney General Op. dated April 7, 2011, 2011 WL 1740752. The Attorney General stated, "Reviewing the language and purposes of the Act, there appears very little doubt the Legislature intended SLED, as the chief investigative agency in South Carolina, to implement and administer the collection of DNA samples." Id. "Given that the Legislature expressly empowered SLED to administer the collection of DNA samples, it is the opinion of this office that a DNA collection program outside the parameters of the Act would be inconsistent with the legislative intent for uniformity in this area and is impliedly preempted." Id.

The Richland County Sheriff Office's retention of Dunn's DNA profile after Petitioner was ruled out as a suspect in the 2010 burglary investigation was an express violation of the State DNA Database Act. The act makes SLED responsible for the expungement of citizens' profiles from the database. S.C. Code Ann. 23-3-660. If a person is never convicted, then their DNA record and profile must be expunged. S.C. Code Ann. § 23-3-660(A)(1)(a).

The record is clear, Petitioner's DNA was taken pursuant to the 2010 burglary investigation where he was never charged. Accordingly, Petitioner's DNA profile should have been expunged. Therefore, the Richland County Sheriff's Office violated the South Carolina DNA Database Act when it retained Petitioner's DNA in its own database, and had trial counsel made that argument there is a reasonable probability the outcome of the suppression hearing would have been different.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688.

In Stone v. State, 419 S.C. 370, 798 S.E.2d 561 (2017) this Court held that trial counsel's performance was deficient for failing to object to the victim impact testimony of the law enforcement officers and the decedent's widow testifying about her suicide attempt. Id. at 387–90, 798 S.E.2d at 570–72. While Stone was a death penalty case, its Strickland analysis is still instructive outside of the death penalty context.

Stone argued at PCR that while trial counsel did object to the widow's testimony, he was deficient for failing to object on several other grounds. Id. at 389, 798 S.E.2d at 571. This Court agreed with Stone that, "both trial counsel and appellate counsel were deficient. At a minimum, trial counsel should have objected to the testimony as impermissible victim impact testimony." Id at 390, 798 S.E.2d at 572.

In Stone, this Court held trial counsel's deficient performance did not prejudice Stone because they, "[found] that not of the five components of the officers' testimony, nor [widow's] testimony... were so compelling that the exclusion of the evidence was likely to result in the jury not making a recommendation of death." Id. at 391, 798 S.E.2d at 572.

Trial counsel here was deficient for the same reason as in Stone. Trial counsel made multiple objections to the DNA's admission, just not the right one. App. 651, ll. 14 – 22. However, Petitioner's case differs from Stone in that the entirety of the state's case rested on the DNA match to Petitioner from the illegal database. App. 661, l. 23 – 662, l. 7. Therefore, Petitioner can show prejudice because had trial counsel objected to the DNA's admission on the grounds that the DNA database was illegal on its face, there was a reasonable probability of a different outcome for Petitioner's trial, and appeal.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694.

Here, trial counsel failed to argue that the Richland County Sheriff Office's DNA database was illegal because it violated S.C. Code Ann. § 23-3-640 (D)'s requirement that SLED must designate a private DNA database and that database must have standards at least as stringent as SLED's to before the private database can legally hold an individual's DNA. App. 651, ll. 14 – 18. He explained at PCR that his focus during the pretrial motions was exclusively on the "consent issue" with the DNA evidence. App. 651, ll. 19 – 22.

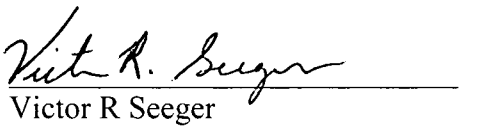
Since the Richland County Sheriff Office's DNA database was illegally created, operated, and maintained, the use of Petitioner's DNA in that database was improper and it should not have been admitted at trial. Accordingly, there is a reasonable likelihood that had trial counsel made that argument, the result of the suppression hearing would have been different. Since all of the evidence in Petitioner's case was fruit of the poisonous tree, as it flowed from the

DNA match on the illegal database, had trial counsel successfully suppressed the DNA evidence, the outcome of Petitioner's trial, and appeal, would also have been different. App. 661, l. 23 – 662, l. 7.

Therefore, Petitioner was prejudiced by trial counsel's ineffective assistance and he should be granted a new trial.

CONCLUSION

By reason of the forgoing arguments, Petitioner respectfully requests that this Court vacate his conviction and remand his case back to the circuit court of a new trial, or in the alternative, grant Certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD MAURICE DUNN, JR.

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 Samuel Key, 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 Edward M. Dunn, Jr., #351031, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of May, 2019.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 3rd day of June, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019