

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-001173
Opinion No. 27913
August 7, 2019

RECEIVED

AUG 22 2019

S.C. SUPREME COURT

ANTRELL RASHAWN FELDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

On August 7, 2019, this Court issued a published opinion reversing and remanding the order denying post-conviction relief and remanding the matter to the Court of General Sessions for a retrial on the Sumter County indictments for murder and possession of firearm or knife during the commission of a violent crime (2009-GS-43-0059). Antrell Felder v. State, Appellate Case No. 2017-001173 (August 7, 2019). Rehearing is proper for two reasons. The Court misapplied the burden of proof in post-conviction cases and failed to give deference to the PCR court's conclusions. Rehearing is appropriate.

I.

The Court correctly stated the following standard for Sixth Amendment prejudice. The Court stated: "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.” Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). The PCR court should also evaluate “the strength of the State's case in light of all the evidence presented to the jury.” *Id.* Generally, “the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.* However, “the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.* at 189, 810 S.E.2d at 844.” *Felder, supra.*

However, the Court did a limited assessment of the strength of the State’s case and only addressed that which supported their conclusion. However, unlike a determination of “harmless error” the burden was on *Felder* to show prejudice, not the State to show a lack of prejudice. This failing caused the Court to misapply the standards of Strickland v. Washington, 466 U.S. 668 (1984). 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 (1984); *Butler*, at 442, 334 S.E.2d at 814. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866–867, (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *Strickland*, 466 U.S. at 693 (1984). “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* At 695.

This solitary reference to lynching in the summary was apparently neglected by the defense, as well as the solicitor and trial court. This inference is supported by the fact that when

the judge was completing the *in camera* discussion about the pending lynching charge before inquiring about the Petitioner's decision to testify, counsel Kent revealed that he was aware of the lynching charge itself, but asserted it may or may not be inadmissible. App. 469, 12-15. It is obvious that if counsel realized that the lynching had already been admitted, the objection would not have been necessary. It is clear, though the trial court and counsel had both reviewed State Exhibit 35 (App. 349-350) earlier, a conclusion that the lynching charge was not admissible would have been unnecessary. Simply put, in light of the rest of the record, the brief lynching charge comment in the summary that had already been admitted had minimal impact on the parties. Similarly, it cannot be questioned that had an objection been made prior to the publishing of the statement, the lynching comment would have been redacted. Was it neglect on the part of counsel? Yes. Was it prejudicial under Strickland when none of the participants apparently realized similar information had gone before the jury in passing? No.

The determination of prejudice is resolved by the hearing court, and ultimately this Court by a review of the entirety of the trial record and the PCR record. Although that determination does not require the Court to ignore an assessment by counsel of its impact, the Court is not bound by it nor is automatically entitled to any presumption, as with the Strickland presumption of competent performance in assessing the deficient performance prong.

Counsel Kent testified at the evidentiary hearing that he did not believe that lynching comment statement alone would have made the difference in the trial, although he admitted in hindsight it was probably a mistake not to redact it. App. 703, line 2-5. Chandler opined that the statement "*could* have" changed the outcome of the case, but explained that there were three "very compelling things in this case" that decided the question of Petitioner's guilt, none of which were the statement about Petitioner's bond. App. 735 (emphasis added). "[E]ven if an

omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 6 (2003). Chandler’s testimony makes it clear that, while one might pick apart their strategic decisions years later with the benefit of knowledge of every detail of the case and what occurred at trial, at the time of his representation, he and counsel Kent did not believe this harmed their client’s chances of acquittal.

Although counsel Kent would not say the prosecution’s case was strong, he clarified that it was his opinion that it was a “strong circumstantial case.” App. 686, ll. 7-10. The defense was to discredit the State’s version and prove that Petitioner was not there. However, the problem was the DNA found on the hat. App. 688. Counsel Chandler opined the he did not think the statement would have made a difference in the result. App. 702.

The Court opinion did not recognize that this case was more than merely about the hat located at the scene. The particular baseball hat found at the this scene was viewed on the shooter - not the victim - and was directly connected to the crime. Further, the red hat was directly connected to Petitioner through both the fingerprint on the label and the mixed DNA from the hat’s swab. A similar white 4 door vehicle to the shooter’s car was directly connected to the Petitioner who admitted driving the vehicle at a similar time that evening, an evening when few vehicles were seen on the roadways. That particular vehicle registered to the Petitioner’s mother was also connected to the Petitioner through his DNA and a fingerprint on an item within the vehicle.¹ That particular vehicle was left by Petitioner according to his statement at Sada’s house with the keys on the floorboard while Petitioner claimed he went to Red Bay between 12:25 and 12:35 and remained at Red Bay until 3 am. Tr.p. 353. That particular vehicle

¹ The Petitioner’s print was also located from the white Buick on a lottery ticket recovered from the car. App. 403-404. Felder’s DNA was also present in the car. App. 440-41.

was seen after 1:30 am being driven back to the Willow Morand apartment by Petitioner's girlfriend - who had earlier remained at Harry Street when the police responded to the break-in call.

The giving of a false identity when the police were seeking to question him speaks of guilty knowledge. The Petitioner's odd claim in his statement of taking an unusual "back way" route which avoided the crime scene in his statement and an alibi claim with an unknown person questions his credibility about the crime. (App. 352-53). The Petitioner acknowledged wearing similar clothes that day as the shooter wore - white shirt and dark pants, but then claimed to have changed clothes into all black that morning. App. 353.

The inferences drawn by the affirmative acts in changing matters from the time of the crime also suggest guilty knowledge. The timeliness of the removal of the window tint on the day of the crime, his false identification to police as Tavaras, his change of clothes and his claimed leaving the car away from his home with the keys suggested guilt. See State v. Thompson, 278 S.C. 1, 10, 292 S.E.2d 581, 587 (False and conflicting statements are evidence of guilty knowledge and intent). Finally, his claimed alibi in being with the unknown "Boo", whose real name he did not know nor his address was also more than merely suspicious under these circumstances.

Evidence was also presented that this was not the first break-in at Petitioner's home. App. 365. Further, there was evidence presented that Petitioner knew the victim and that McKenzie had purchased "items" from Felder on occasion. App. 365, l. 15-20.

Against this backdrop was the contemporaneous break-in of the Petitioner's home and the oddly reported only thefts of shoes by his girlfriend [prior to her apparent knowledge of the shooting], while Petitioner later reported clothes, shoes and hats after he turned himself in

concerning the crime. Compare App. 458 - 459 with App. 352 - 353. As the state cogently pointed out in their closing, who breaks into a home to steal a baseball hat! App. 511.

Against the backdrop was the presence on the victim at the crime scene of a camera which had recorded the Petitioner's girlfriend's birthday party, implicitly suggesting the camera was a product of the break-in-albeit unreported. App. 418-420. This was a strong circumstantial evidence case.

Critical to the prejudice assessment is the specific impact counsel's error had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99. The Court relied on Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) where there was improper admission of evidence of a crime. This Court concluded counsel was deficient for failing to object to an officer's testimony that robbery defendant had committed a prior burglary. The officer's testimony was in response to an improper attempt to introduce evidence that defendant committed another crime, the State did not present clear and convincing evidence that defendant had committed a prior burglary, and the investigator admitted that the prior burglary had never been solved. Petitioner is correct that 6th Amendment prejudice was found, but ignores that there were multiple other findings of deficient unrelated the burglary comment. Importantly, those other findings of deficient performance included a failure to cross-examine a witness about a carjacking charge and the improper evidence about a burglary, weighed against its assessment of the strength of the State's case, the Court found the errors significantly undermine confidence in the outcome.

Here, it was only a singular and brief reference to the pending charge that was even overlooked by the trial court as well as counsel when it was presented and not emphasized, unlike the attempt in Smalls by the State to connect the burglary and theft with the crime on trial.

There was no use of the bond comment by the State in Petitioner's case. The Petitioner claims that the only evidence linking Petitioner to the crime scene is the red baseball hat. Respondent submits that there was sufficient evidence that Felder was at the scene of Willie McKenzie's shooting. This was supported not only by the presence of the hat worn by the shooter at the crime scene with his fingerprint and DNA present, but also by the identity of the vehicle driven by the perpetrator consistent with the vehicle owned by Petitioner's mother that he was seen driving moments before the incident .3 miles away and his attempt to evade questioning by his attempt to falsely identify himself to law enforcement. Contrary to Smalls, minimal impact of the inadvertent admission of the comment did not undermine confidence in the verdict.

Evidence of a defendant's prior bad act is not admissible to show that the defendant has a disposition or propensity toward the commission of a crime. However, any error was harmless, because evidence of defendant's guilt was overwhelming, and there was no significant probability that the arrest for the offense affected the outcome of the trial. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony that he compared defendant's fingerprints with fingerprint card agency had on record was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony that he told defendant that he was under arrest for escape and murder and that he asked defendant where correctional truck was were extremely vague); State v. Robinson, 238 S.C. 140,

119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Court emphasizing that, even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime).

The evidence in the record of Petitioner's guilt is probative evidence that supports the PCR court's ruling that the admission of this brief reference that Felder was out on bond for lynching did not change the outcome of the trial. There was both direct evidence and substantial circumstantial evidence establishing Petitioner was at the scene when the murder occurred. As noted at the evidentiary hearing by Mr. Chandler, the biggest evidence of Petitioner's guilt was the red hat found at the scene of the crime near the deceased victim's body containing Petitioner's DNA and fingerprints. See App. 184; App. 218. There was also evidence that Petitioner had recently had the tint removed from his car windows, and that his vehicle otherwise matched the description of the car the shooter drove. Petitioner admitted to wearing a white shirt earlier that day, which matched the description of the clothing worn by the shooter.

All the evidence of Petitioner's guilt presented at trial is probative evidence supporting the PCR court's finding that the statement of Petitioner's bond for a pending lynching charge did not change the outcome of the trial. The record indicates there is clearly enough evidence to allow the jury to convict Petitioner of the charges regardless of any indication of unrelated pending charges. Therefore, Petitioner can show no prejudice under Strickland, and the PCR court's finding that Trial Counsel was not ineffective should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing and affirm the denial of state post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar No. 5758

By 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3601

August 22, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 22 2019

Certiorari to Sumter County
D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-001173
Opinion No. 27913
August 7, 2019

ANTRELL RASHAWN FELDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,


Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: David Alexander, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of August, 2018.



ANGELA BENNETT
Administrative Coordinator

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



RECEIVED

AUG 22 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 22, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Antrell Rashawn Felder v. The State
Appellate Case No: 2017-001173

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Petition for Rehearing* along with proof of service in the above-referenced case.

Sincerely,

Donald J. Zelenka
Deputy Attorney General
S.C. Bar No. 5758

DJZ/ab
Enclosures

cc: David Alexander, Esquire
Victim Advocacy Division