

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable John C. Hayes, Circuit Court Judge

RECEIVED

SANDY LYNN WESTMORELAND,

JAN 16 2020

PETITIONER
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001251

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where counsel advised petitioner that he “had to” testify, and where petitioner’s testimony cemented the state’s case against him, since petitioner had a right to remain silent at his trial, and counsel failed to adequately convey that right to petitioner?

STATEMENT

Petitioner was indicted by a Spartanburg County Grand Jury for the offenses of murder and hit and run with death. App. 623 – 626. He was tried before the Honorable Roger L. Couch and a jury from December 1 – 4, 2014. App. 1. Petitioner was represented by Matthew Shealy and the state was represented by Abel Gray and Megan Moricle. App 1.

Petitioner was charged with the death of Michael Daniels (decedent), who was his best friend and lover of eighteen years. App. 311, l. 8 – 312, l. 7. On March 14, 2012, petitioner was seen at the emergency room (ER) of Mary Black Hospital because he had severe abdominal pain and blood in his stool. App. 241, ll. 9-23; App. 242, ll. 5-10. He was given two shots of Dilaudid, a pain killer, while in the ER. App. 243, ll. 9-23. At the time, petitioner was also prescribed and had taken two additional drugs which might have impaired his ability to drive—Valium and Lortab.¹ App. 250, ll. 4-23; App. 318, l. 24 – 319, l. 18.

While at the ER, petitioner and the decedent got in an argument and the decedent left the hospital on foot. App. 248, ll. 8-12; App. 323, ll. 3-5. Petitioner was discharged and saw the decedent walking along. App. 323, ll. 15-25. The events that occurred next were disputed, although it was undisputed that petitioner struck and killed the decedent with his Ford Explorer. App. 327, l. 18 – 328, l. 23.

The decedent was found the next day by a pedestrian, “laying flat on his back,” “on the backside of [some] shrubs,” near the road. App. 100, l. 5 – 101, l. 2. It was later determined petitioner had been likely struck from behind, which caused his skull to crush his spinal cord and immediately resulted in his death. App. 185, l. 1 – 186, l. 19.

¹ Petitioner had a number of chronic health conditions including diabetes, emphysema, “COPD,” macular degeneration, and a history of hernias and kidney stones. App. 242, ll. 11-12; App. 246, ll. 14-22; App. 250, ll. 7-12; App. 326, l. 15 – 327, l. 9.

Petitioner's defense was one of involuntary intoxication and accident. As a child, petitioner was in special education classes in school, and he only had a seventh grade education. App. 600, ll. 16 – 601, l. 15. Petitioner had no prior criminal record. App. 309, ll. 17-21. Petitioner said that he saw the decedent, who was wearing a red jacket, walking along, and he “jerked the car over” in an effort to pick him up. App. 327, ll. 20-22; App. 350, ll. 13-23. However, petitioner said he “felt a bump.” App. 328, ll. 2. Petitioner explained that he turned around and went back to check on the decedent, and tried to perform CPR, but the decedent had passed away. App. 328, ll. 5-18; App. 600, ll. 6-7. Petitioner offered that he did not call 911 or otherwise notify authorities because he was frightened that he would go to jail. App. 336, ll. 8-21.

The state argued petitioner intentionally struck the decedent. It offered that although petitioner was pulled over shortly after the fatal collision, he told the police officer the damage to his car was from hitting a deer. App. 330, ll. 16-25; App. 370, ll. 17-20; App. 353, l. 16 – 354, l. 5. The state also claimed petitioner was not impaired and offered testimony by the ER doctor and others who interacted with petitioner as he was leaving the hospital that petitioner did not appear impaired. App. 249, ll. 15-21; App. 115, ll. 23-24; App. 110, ll. 7-8. The state also entered the testimony of Michael Duncan, a trooper with the South Carolina Highway Patrol's “MAIT” team. App. 201, ll. 14-19. According to Duncan's accident reconstruction, petitioner's tire tracks went off the road and into the grass at a “sharp angle,” and there was no braking before or after the impact. App. 205, l. 25 – 206, l. 3; App. 209, ll. 22-23.

Petitioner testified, and he did not fare well on cross-examination or in the state's rebuttal case. The solicitor repeatedly confronted petitioner with discrepancies between his testimony about the events that evening and the physical evidence recovered at the collision site. App. 342

– 375. For instance, petitioner said the decedent had taken petitioner’s wallet and false teeth with him when he left the hospital, but the state recalled an officer to testify that law enforcement had not found any false teeth or petitioner’s wallet at the crash site. App. 317, ll. 10-24; App. 390, l. 23 – 391, l. 4.

Similarly, petitioner testified that the earlier argument between he and the decedent occurred because the decedent used the last of their money in an attempt to buy crack cocaine, but the state called the decedent’s employer in rebuttal to say that she had never seen any evidence of drug use by the decedent. App. 319, l. 19 – 320, l. 7; App. 387, ll. 6-24.

Petitioner’s testimony cemented the state’s case against him for the offense of hit and run with death, as petitioner admitted on the stand that he did not call 911 and that he left the scene of his collision with the decedent.² App. 330, ll. 2-14; App. 357, l. 17-18.

Petitioner was convicted as indicted and he was sentenced to concurrent terms of thirty years imprisonment for murder, and twenty-five years imprisonment with a fine of ten thousand dollars for hit and run with death. App. 474, ll. 11-17.

Petitioner proceeded to direct appeal, where he was represented by Robert Dudek and the state was represented by Caroline Scrantom. App. 476; App. 498. On direct appeal, petitioner argued, inter alia, that the trial court erred when it allowed the coroner, who was not qualified as an expert, to testify that he determined the decedent’s death was a homicide, given that

² S.C. Code Ann. § 56-5-1210 provides that the driver of a vehicle involved in an accident resulting in the injury or death of a person “immediately shall stop the vehicle at the scene of the accident or as close to it as possible. He then shall return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 56-5-1230.” S.C. Code Ann. § 56-5-1230 provides that the driver of any vehicle involved in an accident resulting in the injury or death of a person “shall render to any person injured in such accident reasonable assistance, including the carrying or making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary . . .”

petitioner's defense was one of accident. App. 479. The Court of Appeals **reversed** petitioner's conviction for murder and affirmed his conviction for hit and run with death. App. 540 – 552.

Petitioner timely filed an application for post-conviction relief (PCR) and the state made its return. App. 564 – 571; App. 572 – 586. A hearing was held on the matter before the Honorable J. Mark Hayes, II, on May 13, 2019. App. 587. Petitioner was represented by Rodney Richey and the state was represented by Johnny James, Jr. App. 587.

At the PCR hearing, the court heard testimony from petitioner and from defense counsel. When asked whether counsel went over his testimony prior to him taking the stand, petitioner said, "A little bit, not enough." App. 597, ll. 22-25. When asked whether counsel went over possible dangers of testifying, petitioner said that counsel "thought it would be in my best interest to testify." App. 598, ll. 3-6. PCR counsel asked petitioner, "Did you all do any preparations in regard to your testimony?" and petitioner explained, "A little, but not—I didn't understand everything exactly." App. 598, ll. 7-10.

Counsel said that when he first received petitioner's case, he "[went] over rights, such as the preliminary hearing, indictment, trial rights, subpoena, testimony, things like that." App. 605, ll. 15-17. According to counsel, he met with petitioner about eight to ten times in total before the trial. App. 608, ll. 15-19. Counsel was asked about the decision that petitioner testify, and he said, "[W]e had talked about it for a while." App. 607, ll. 3-7.

However, counsel repeatedly stated that petitioner "had to testify." "I thought that he had to testify because our defense was involuntary intoxication . . ." App. 606, ll. 6-7. "I didn't think that he could avoid testifying." App. 606, ll. 10-11. "He had to testify to set the stage . . ." App. 606, l. 23. "[We] needed him to testify." App. 607, l. 2. Counsel said that throughout the

pendency of the case, the two talked about **“how he had to tell his story, that he had to.”**³ App. 607, ll. 18-21 (emphasis added). Counsel said his advice that petitioner must testify, however, was in regard to the murder charge. Counsel claimed, “The hit and run we were sunk on.” App. 607, ll. 6-11.

On July 1, 2019, the PCR court issued an order of dismissal which stated, “Prior to trial, the [c]ourt finds [c]ounsel adequately met with [petitioner] on a number of occasions, and wisely advised [petitioner] how to approach trial testimony.” App. 621. Counsel testified he prepared [petitioner] to testify, emphasizing in his discussions that [petitioner] needed to not get angry during his testimony.” App. 621. “That [petitioner] was unable to stick with [c]ounsel’s advice under the pressure of effective cross-examination is [petitioner’s] own shortcoming, not [c]ounsel’s.” App. 621. The [c]ourt finds [petitioner] has failed to present evidence adequate to support this allegation, and finds [c]ounsel’s credible testimony refutes what little was presented.” App. 621.

This petition for writ of certiorari follows.

³ The trial transcript reflects that the court asked counsel “have you talked to your client about his right to remain silent?” and counsel said that he had. App. 305, l. 25 – 306, l. 2. The trial court then went over petitioner’s right to remain silent and his right to testify with petitioner, and petitioner was given additional time to consult with counsel. App. 306, l. 9 – 309, l. 13.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where counsel advised petitioner that he “had to” testify, and where petitioner’s testimony cemented the state’s case against him, since petitioner had a right to remain silent at his trial, and counsel failed to adequately convey that right to petitioner.

Petitioner had an absolute right not to testify at his trial. Counsel’s advice to petitioner that he “had to” testify was deficient performance. Petitioner was prejudiced because he was accused of hit and run and he admitted on the stand that he did not call 911 and that he left the scene.

The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial. *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980); *Griffin v. California*, 380 U.S. 609, 611 (1965). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” *Harris v. New York*, 401 U.S. 222, 225 (1971). “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

“The right of a criminally accused to testify or not to testify is fundamental.” *State v. Rivera*, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013). Here, counsel was insistent that petitioner absolutely “had to tell his story.” App. 607, ll. 18-21. This was ineffective assistance of counsel, because petitioner had the constitutional right to remain silent at his trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient

performance prejudiced petitioner. *Id.* at 687. See *Carter v. Lee*, 283 F.3d 240, 252 (4th Cir. 2002) (“criminal defendant’s contention that his counsel forced him to testify is also analyzed under the principles of *Strickland v. Washington*.”).

“A defendant’s decision to testify or not must be made with knowledge of the consequences of either choice.” *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). Here, petitioner testified that he did not “understand everything exactly” in regard to his conversations with counsel about his testimony. App. 598, ll. 7-10. As seen, counsel’s advice to petitioner—that he had to testify—was incorrect as a matter of constitutional law. U.S. CONST. amend. V. See *Brown v. Artuz*, 124 F.3d 73, 74 (2d Cir. 1997) (“the decision whether a defendant should testify at trial is for the defendant to make [and] trial counsel’s duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of this constitutional right”).

Counsel’s erroneous advice on this fundamental constitutional right was deficient performance that fell below reasonable professional norms. Although the trial court advised petitioner of his right to remain silent, petitioner was then given time to talk with counsel, who apparently insisted that he testify. Counsel’s advice on this matter effectively left petitioner without the ability to exercise his right to remain silent, given counsel’s apparently repeated exhortations that he must testify.

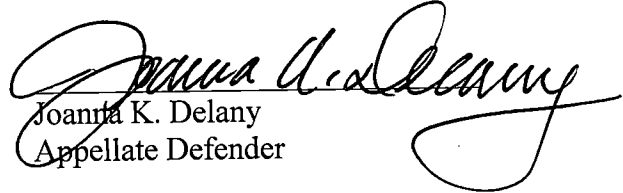
“To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Petitioner's murder conviction was vacated by the Court of Appeals. Therefore, his PCR claims of ineffective assistance of counsel were only in regard to the remaining charge of hit and run with death. As to that charge, petitioner's testimony, which was improperly compelled by his counsel, cemented the state's case. As seen, petitioner admitted on the stand that he did not remain at the site of the collision and that he did not call 911 or otherwise alert medical personnel.

Petitioner's testimony was compelled by the erroneous and deficient advice of his counsel. Absent this testimony, there is a reasonable probability the outcome of the trial would have been different. *Patrick v. State*, 349 S.C. at 207, 562 S.E.2d at 611.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

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SANDY LYNN WESTMORELAND,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sandy Lynn Westmoreland states:

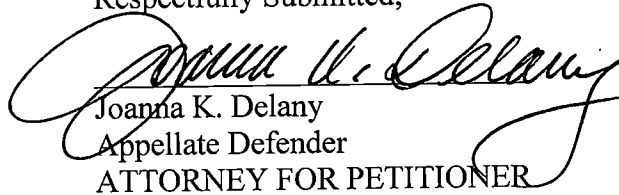
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge John C. Hayes, which was held on May 13, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Sandy Lynn Westmoreland.

Respectfully Submitted,

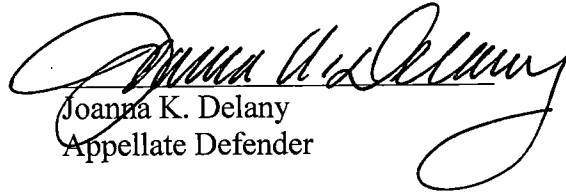


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of January, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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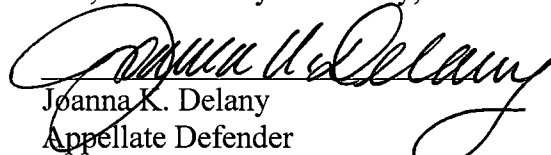
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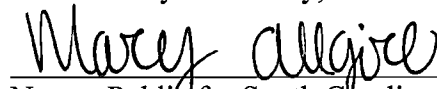
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Sandy Lynn Westmoreland, #362335, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of January, 2020.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of January, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.