STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

JEREMY JEROME KNIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001474

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution when he elicited improper opinion testimony from a police officer that the deceased's death was the result of murder and that Petitioner was the perpetrator because the testimony invaded the province of the jury, opined on the ultimate issue presented, and went to the heart of the issue before the jury – Petitioner's state of mind?

STATEMENT

In February 2002, Bryant Cheeks and Jerome Petty were living together in a duplex in Spartanburg County. App. 114, ll. 14-18; App. 138, ll. 21-24. On February 24, the two men hosted a "little get-together" for friends. App. 115, ll. 9-12; App. 139, ll. 9-13; App. 164, ll. 7-9. Miranda Aull and Petitioner attended. App. 116, ll. 1-14; App. 139, ll. 14-19. Petitioner had known Bryant for years because the two grew up in the same neighborhood. App. 116, ll. 9-12. Likewise, Petitioner knew Petty since elementary school. App. 139, ll. 20-21. Bryant was well acquainted with Aull as well because the two attended school together and her grandmother lived nearby. App. 116, ll. 15-25. The party-goers were consuming alcohol, and some, including Petitioner and Aull, were using drugs. App. 117, ll. 1-18; App. 139, l. 25 – App. 140, l. 11. Eventually, the party dwindled to Bryant, Petty, Petitioner, and Aull. App. 119, ll. 25 – App. 120, l. 5. Bryant and Aull had sex in Bryant's bed while Petty was in his room and Petitioner was on the couch in the living room. App. 120, ll. 7-19; App. 141, ll. 15-18.

The following morning, Bryant claimed that he got up around 7:30 a.m. so that he could go to work with his brother, Michael Cheeks, who had arrived to drive Bryant to their common workplace. App. 123, ll. 15-25; App. 164, ll. 17-23. According to Bryant, Aull was awake and combing her hair when he left between 7:00 a.m. and 7:30 a.m. App. 123, ll. 16-19; App. 125, ll. 13-16. Petitioner was still asleep in the living room. App. 124, ll. 6-13; App. 125, l. 17 – App. 126, l. 1. Michael also claimed that he saw Miranda in the duplex that morning while he was waiting on Bryant to get ready for work. App. 164, ll. 22-25. According to Michael, Petitioner was on the floor in the living room at the time. App. 165, ll. 23-24; App. 171, ll. 6-17.

While Bryant was on his way to work, Petty's mother called him looking for Petty. App. 136, ll. 3-9; App. 153, l. 14 – App. 154, l. 1. Upon learning that Bryant was no longer at the

duplex, Petty's mother went to the duplex in search of Petty. App. 154, ll. 2-9. Petty's mother found the door unlocked so she entered. App. 154, ll. 13-20. As she walked to Petty's room, she passed by Bryant's room. App. 154, ll. 21-24. She claimed the door to Bryant's door was slightly cracked open so she could see inside. App. 155, l. 12 – App. 156, l. 4. She further claimed that she saw Petitioner "laying across the bed on the left-hand side, eagle-like." App. 156, ll. 5-7. Petty's mother knocked on his bedroom door, but he did not answer. App. 156, ll. 17-19. She then walked into his room. App. 156, ll. 19-20. Petty awoke to his mother standing over him. App. 142, ll. 8-10; App. 156, ll. 20-22.

Petty's mother claimed that while she was talking to Petty, Petitioner left out of the room, slamming the door, and going outside. App. 157, ll. 8-10. Petty's mother followed Petitioner outside the duplex. App. 157, ll. 11-12. She alleged that she saw scratches on Petitioner's face. App. 157, l. 15. Petitioner then got into his car and backed out of the driveway. App. 158, ll. 2-3. Petty's mother re-entered the duplex and asked Petty if he had been in a fight. App. 158, ll. 3-5. Her question was prompted by "fresh scratches" on Petitioner's face. App. 158, ll. 6-11. Petty's mother then left. App. 158, ll. 12-13. As she was leaving, she saw Petitioner pull back into the yard and knock on the door. App. 158, ll. 14-24.

According to Petty, Petitioner was in the yard when Petty got out of bed. App. 142, ll. 21-23. Petty then left to go to his mother's house. App. 143, ll. 16-17.

When Bryant got off from work, he and Michael drove to Petty's mother's house to pick up Petty. App. 128, ll. 1-14; App. 143, l. 23 – App. 144, l. 13; App. 168, ll. 1-9. The threesome then went to the duplex. App. 128, l. 25 – App. 129, l. 3; App. 144, ll. 14-15; App. 168, ll. 19-21; App. 174, ll. 3-4 (in contrast to others, Michael claimed that Petty's brother, Jason, was with them when Aull's body was found). Bryant found Aull on his bed. App. 129, ll. 15. When

Bryant touched Aull's wrist, he discovered she was cold. App. 129, ll. 18-21; App. 144, ll. 16-21 (Petty claimed he touched her hand and it was cold); App. 169, ll. 23-25 (Michael also claimed he touched her and found that she was cold). Michael and Petty joined Bryant in his room. App. 129, ll. 1-3; App. 144, ll. 16-21; App. 169, ll. 7-20. Although Bryant had a cell phone, Petty walked to his mother's house to call for help. App. 130, ll. 3-9; App. 136, ll. 10-11; App. 144, ll. 22-25; App. 151, ll. 7-8; App. 170, ll. 4-6.

Around 3:30 p.m., emergency medical personnel were dispatched to the home. App. 105, l. 25 – App. 106, l. 1. Petty was unable to tell the medical professionals Aull's last name. App. 109, l. 20 – App. 110, l. 1. He simply described Aull as a friend of a friend. App. 109, l. 20 – App. 110, l. 1. Unfortunately, Aull was already dead when the medical professionals arrived. App. 106, ll. 14-23. The first responders found no trauma on Aull's body, however. App. 110, ll. 9-11. Ultimately, the pathologist determined Aull died as a result of asphyxia, secondary to manual strangulation. App. 297, ll. 25-30. He explained that "[i]t takes very little pressure to occlude the carotid arteries which run up beside the neck to stop the blood flow. It takes about six pounds of pressure." App. 298, ll. 6-8.

Later that night, the police arrested Petitioner. App. 203, ll. 16-19; App. 204, ll. 7-15. In the very late hours of the night, the police interrogated Petitioner regarding Aull's death. App. 206, ll. 18-23. Petitioner told the police about the party he attended at the home of Bryant and Petty. App. 213, ll. 21-24. He also told the police that Aull first went to bed with Petty. App. 214, ll. 9-10. Completely naked, she left Petty's bed and went to Bryant's bed. App. 214, ll. 10-12. When he awoke, he tried to talk to Aull about her conduct. App. 214, ll. 19-23. Aull was not receptive to Petitioner's advice and cursed at him. App. 214, ll. 23-24. Aull scratched him.

App. 215, l. 1.[1] Petitioner then used one of his forearms across her neck to hold her down. App. 215, ll. 2-4. Aull continued to argue with Petitioner and scratched him again. App. 215, ll. 4-6. Petitioner got up and left. App. 215, ll. 7-8. He saw Aull was crying as he left. App. 215, ll. 8-9.

Shortly after Petitioner gave this statement to police, another investigator, Steve Denton, grew dissatisfied with what Petitioner said and wanted to continue the interrogation. App. 241, l. 16 – App. 244, l. 4. Denton claimed he confronted Petitioner with what he considered inconsistencies between Petitioner's statement to police and what Denton found while he was at the morgue. App. 247, ll. 12-25. During this second interrogation, Petitioner told Denton that he was trying to caution Aull about her conduct, but she did not want to hear what he had to say. App. 250, ll. 17-21. Denton claimed that Petitioner changed his story:

> When she wouldn't listen and turned her back, I tried to turn her around so she couldn't turn her back again so she could hear what I had to say. I held her shoulders down. She got physical back. That's when the matter got out of hand. At that point I began to choke her with one hand. When she scratched me, she began squeezing my face. I began to use both hands to choke her. I wanted her to hear what I had to say. I felt disappointment, let down. I had put so much into the friendship. I let her go before she stopped breathing. She took a deep breath. She was gasping for air. At that point I was scared. I realized she was not breathing. I then began to pray and do C.P.R. I didn't now if I was doing it right. I tried. I covered her all the way up except her head. I was very scared. I didn't know what to do.

App. 251, ll. 2-14.

On April 11, 2002, a Spartanburg County grand jury indicted Petitioner for murder (2002-GS-42-1401). App. 573-574. The state, represented by Harold W. Gowdy, III, and Susan Olmert, called the case to trial before the Honorable J. Derham Cole and a jury on July 8-10, 2002. App. 1. Karen Quimby and Michael Bartosh represented Petitioner. App. 1.

[1] Petitioner's DNA was found in Aull's fingernail scrapings. App. 232, l. 22 – App. 234, l. 23.

Trial counsel requested the judge instruct the jury on voluntary manslaughter, but the state opposed the request. The state argued there was no evidence that Petitioner acted in the heat of passion or based upon sufficient legal provocation. App. 324, l. 2 – App. 325, l. 22. Judge Cole reviewed Petitioner's statement to police. App. 326, ll. 18-20. Thereafter, the judge denied the request for an instruction on voluntary manslaughter. App. 327, ll. 1-22. The judge's ruling hinged on his interpretation of Petitioner's statement – that Petitioner engaged in a physical assault first. App. 327, ll. 1-22; App. 328, l. 3 – App. 329, l. 2.

Ultimately, the jury found Petitioner guilty as charged. App. 374, ll. 22-25. Judge Cole sentenced Petitioner to life imprisonment without the possibility of parole (LWOP). App. 378, l. 22 – App. 379, l. 2; App. 575.

Petitioner filed a notice of appeal, which was perfected by Joseph L. Savitz, III. App. 381-390. On appeal, Petitioner challenged the trial judge's failure to instruct the jury on voluntary manslaughter based upon the evidence presented. App. 381-390. On February 18, 2004, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Knight, 2004-UP-105 (S.C. Ct. App. filed Feb. 18, 2004); App. 391-395.

On February 23, 2005, Petitioner filed an application for post-conviction relief. App. 396-401. The matter proceeded to a hearing on September 18, 2006, before the Honorable Doyet A. Early, III. App. 407. C. Kevin Miller represented Petitioner. App. 407. S. Prentiss Counts and Paula Magargle represented the state. App. 407. The record was left open to allow the parties to depose appellate counsel. App. 434, ll. 12-24. Miller was placed on interim suspension on March 7, 2012. App. 543. This Court disbarred Miller on January 2, 2014. App. 543. Thereafter, the circuit court appointed Susannah Ross to represent Petitioner in his PCR action on September 14, 2018. App. 543-544. Ross moved for a de novo evidentiary hearing in

the case. App. 544. On February 24, 2019, the court ordered a de novo hearing on Petitioner's PCR application. App. 544.

On May 7, 2019, Petitioner filed an amended application. App. 437-438. A de novo hearing was held before the Honorable J. Mark Hayes, II, on May 14, 2019. App. 439. Ross represented Petitioner, and Jacob Isenberg represented the state. App. 439. By an order filed August 23, 2019, Judge Hayes denied relief to Petitioner. App. 543-572.

Petitioner served his notice of appeal on August 29, 2019. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution when he elicited improper opinion testimony from a police officer that the deceased's death was the result of murder and that Petitioner was the perpetrator because the testimony invaded the province of the jury, opined on the ultimate issue presented, and went to the heart of the issue before the jury – Petitioner's state of mind.

Relevant facts

During the cross-examination of Steve Denton, the police investigator who obtained the highly incriminating statement from Petitioner, trial counsel questioned Denton about his interrogation techniques. App. 253, l. 18 – App. 255, l. 17. Thereafter, trial counsel asked whether Denton was familiar with Petitioner's first statement to police prior to his interrogation of Petitioner. App. 255, l. 25 – App. 256, l. 6. Trial counsel asked whether Denton "felt it wasn't enough." App. 256, l. 7. Denton responded, "I felt if it was the truth, it was plenty enough. I don't know how you quantitate that - - enough." App. 356, ll. 8-9. The following exchange took place thereafter:

> Q Well, you didn't think that it was sufficient that it was a confession that he had strangled Miranda Aull?
>
> A Again, I am not sure what your question is. As far as looking at the statement and looking at the body and seeing the inconsistencies, is when I certainly had a problem.
>
> Q Seeing they didn't go far enough?
>
> A I am not characterizing it - - I'm not sure what you are asking.
>
> Q Well, what is it that you wanted him to tell you?
>
> A The truth.

Q Well, what did you believe the truth to be?

A Only he knew that.

Q Well, what did you think it was?

A I don't have an opinion on what the truth is. I wasn't there and didn't commit the murder. Only the person that did could tell me that, and he did.

App. 255, ll. 10-25. Trial counsel did not object or move to strike Denton's characterization of Aull's death as a murder, his opinion that Petitioner was the perpetrator, or his opinion that Petitioner acted with malice.

After noting that Bartosh, who was trial counsel conducting the cross-examination of Denton had died prior to the PCR hearing and was unable to provide testimony regarding this line of questioning, the PCR judge found that based on the transcript it appeared trial counsel "decided to stick with his line of questioning on the Denton's identification of inconsistencies." App. 562. Remarking that "[i]t would have be[en] unusual for [trial counsel] to object to a question he elicited" and that "a motion to strike along with a curative instruction would have been the more practice route," the PCR judge found "this may have brought unnecessary attention to the testimony." App. 562.

According to the PCR judge, the jury heard the confession and the solicitor only mentioned Denton in closing to argue that Petitioner understood his rights prior to confessing. App. 562. Thus, the PCR judge concluded, "Denton's importance to this case was merely to reflect the confession was voluntary." App. 562. Based upon these findings, the PCR judge concluded there was no reasonable probability that a jury would have doubted guilt if the singular opinion had been struck from the record. App. 562. Accordingly, the PCR judge found

Petitioner suffered no prejudice from trial counsel's eliciting the damaging testimony and failing to move to strike. App. 562.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "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." Id. at 686. 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. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989). 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). In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

"If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or determination of fact in issue, and (c) do not require special knowledge, skill, experience, or training." Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

This Court addressed a similar issue the year prior to Petitioner's trial. State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001). A police officer testified that in his opinion, the deceased was "astride the bike when shot." Id. at 177, 547 S.E.2d at 491. The officer was qualified as an expert in crime scene process and fingerprint identification. Id. "As such, he was qualified to testify, as he did, to measurements taken at the scene, to the recovery of shell casings, and to the identification of blood stains." Id. However, "[h]e exceeded the scope of his expertise when he was permitted … to impart to the jury his conclusion, drawn from these measurements and observations, regarding the location of the victim and the position of his body vis-à-vis the bicycle at the time of the shooting." Id. at 177-178, 547 S.E.2d at 491. This Court held the officer "was allowed to give his opinion on the ultimate issue: Whether [Ellis] was acting in self-defense when he shot and killed the victim." Id. at 178, 547 S.E.2d at 491. "This was error." Id.

Further, this Court held the testimony was not harmless in light of Ellis's assertion that he was acting in self-defense. Id. "An officer's improper opinion which goes to the heart of the case is not harmless." Id. According to this Court, the error in allowing the officer's testimony,

which exceeded the scope of his expertise and involved the ultimate issue in the case, was compounded by the solicitor's closing argument in which he repeatedly referred to the scientific testimony offered by the officer. Id.

This Court recently addressed the admissibility of a forensic pathologist's testimony regarding the manner of death. State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417-418 (2011). In that case, the pathologist testified the deceased's manner of death was homicide. Id. at 263, 721 S.E.2d at 418. After explaining that pursuant to statutory law, "the testimony that an individual died from 'homicide' means simply that he or she died by the act, procurement, or omission of another without regard to the criminality of the killing or culpability of the killer," this Court noted that it was "well-established in South Carolina that a medical professional, qualified as an expert, may render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial." Id. at 265, 721 S.E.2d at 419 (internal quotations omitted). This Court concluded that a qualified expert may testify as to cause and manner of death. Id. at 266, 721 S.E.2d at 419.

However, the pathologist relied upon anecdotal history – the information from the police – to form the basis of his opinion. Id. Although this Court held the pathologist could testify about anecdotal evidence and give his opinion on reliance of such evidence, this Court recognized that "in certain circumstances, expert medical testimony of this type has the potential to invade the province of the jury." Id. at 267-268, 721 S.E.2d at 420. Thus, this Court held that "an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not

permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." Id. at 269, 721 S.E.2d at 421.

In a case similar to Commander, supra, the Court of Appeals addressed impermissible opinion testimony from a trial arising out of Spartanburg County, just as Petitioner's. State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017). The coroner testified he concluded the manner of death was homicide. Id. at 418, 807 S.E.2d at 705. The Court of Appeals held the trial court abused its discretion by allowing the coroner's testimony because it was "improper opinion testimony by a lay witness." Id. at 418, 807 S.E.2d at 706. The coroner's opinion as to manner of death "was not based on his perceptions." Id. at 419, 807 S.E.2d at 706. Instead, his opinion "was based on the findings of the pathologist and the investigation of law enforcement." Id. at 419-420, 807 S.E.2d at 706. The Court of Appeals held the coroner's testimony that the death was a homicide, which he defined as an intentional act, was an opinion on Westmoreland's state of mind and, thus, his guilt under the circumstances of the case. Id. at 421, 807 S.E.2d at 707.

The Court held the coroner's testimony was not harmless because it "went to the trial's main issue regarding murder and went to the heart of [Westmoreland]'s defense." Id. The error "could reasonably have affected the result of the murder conviction by commenting on the main issue to be decided by the jury and discrediting [Westmoreland]'s main defense." Id. at 422, 807 S.E.2d at 707. Based upon the evidence presented "the main issue for the jury to decide regarding the murder indictment was whether the incident was the result of an intentional act or an accident. Such a determination likely would have been the deciding factor when assessing whether [Westmoreland] acted with malice aforethought, which was an essential element of murder." Id. at 423, 807 S.E.2d at 707. The coroner told the jurors that "any death presents five

options: natural, accident, homicide, suicide, and undetermined." Id. He also told the jurors that homicide requires an intentional act. Id. Finally, he testified that he ruled the case a homicide and ruled out the other possible manners of death, which included accident. Id. Thus, the coroner's testimony went directly to the main issue during trial and the heart of [Westmoreland]'s defense that the incident was an accident." Id. at 423, 807 S.E.2d at 708.

In the present case, trial counsel performed deficiently by eliciting the improper and damaging testimony from Denton. Further, trial counsel performed deficiently by failing to object and/or move to strike the testimony. Denton told the jurors that Aull's death was a murder. He also told the jurors that Petitioner was the culprit. Thus, he improperly opined that Petitioner was the person who committed the offense and that his state of mind at the time of the commission of the offense was malice. Denton's testimony was improper opinion testimony that went to the heart of the case.

Contrary to the PCR judge's finding that trial counsel's error was not prejudicial because Denton's role was limited to establishing that Petitioner's statement to police was voluntary, Denton's improper opinion testimony was very prejudicial to Petitioner. As this Court previously held, "[a]n officer's improper opinion which goes to the heart of the case is not harmless." State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001). The sole issue for the jury was whether Petitioner acted with malice. Denton invaded the province of the jury and opined on the ultimate issue when he informed them that Petitioner had acted with malice because he described the death as murder. There was simply no escaping the import of Denton's improper testimony on the jury.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with briefing, Petitioner respectfully requests this Court reverse the PCR judge, grant Petitioner relief, and order a new trial.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2020.