STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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May 15 2020

S.C. SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

ROGER BRUCE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001494

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether this case should be remanded for a new PCR hearing or in the alternative, findings of fact and conclusions of law on whether appellate counsel was ineffective for failing to raise Petitioner's extremely meritorious objection to the admissibility of statements Petitioner made to law enforcement while in their custody, and before they read him his Miranda rights, since trial counsel had properly preserved that objection for appellate review and appellate counsel did not raise that issue in Petitioner's direct appeal?

STATEMENT

Petitioner was indicted in April of 2010 by the Florence County grand jury for murder. App. 896 – 897. On August 8, 2011, Petitioner's case was called to trial before the Honorable Thomas A. Russo and a jury. App. 1. Petitioner was represented by Jack Lawson and Scott Floyd. The state was represented by E. L. Clements. App. 1. The jury found Petitioner guilty as charged. App. 519. The judge sentenced him to life without the possibility of parole. App. 524, ll. 17 – 21.

On October 12, 2009, three law enforcement officers, Beckett, Hobgood, and Starling, responded to Petitioner's residence to perform a welfare check about his girlfriend, Laura Creel. App. 145, l. 10 – 146, l. 3. The officers made contact with Petitioner at the front door of the residence and he informed them that Creel was not present. Petitioner gave the officers permission to come inside to look for Creel. App. 152, l. 7 – 153, l. 16. After the officers scanned the residence and did not find Creel, they asked Petitioner when he last saw her. Petitioner informed the officers that he and Creel had an argument several days earlier and he had not seen or heard from her since then. App. 154, ll. 6 – 23.

The officers then noticed a cell phone and car keys on a table which Petitioner said belonged to Creel. Hobgood picked up the car keys and walked outside to the car. App. 155, ll. 1 – 7. Hobgood attempted to open the trunk of the car with the keys but was unable to do so. App. 155, ll. 11 – 17. Officer Beckett recalled:

> [Hobgood] went towards the trunk, attempted to use[] the key to open the trunk but the key wouldn't open it, so he asked [Petitioner] which key opened the trunk of the car. And at that time [Petitioner] wanted to hold the keys to show Corporal Hobgood which key it was, which Corporal Hobgood didn't want [Petitioner] to get the keys because obviously, you know, we wasn't [sic] sure what he would do with them . . .

App. 162, ll. 2 – 12. Before Petitioner was able to take the keys out of Hobgood's hand, Officer Starling reached over and pushed a button on the key fob which caused the trunk to open. Creel's body was found in the trunk of the car and Petitioner was immediately placed in handcuffs and detained. App. 162, l. 13 – 163, l. 20.

Petitioner was transported to the police station to be interrogated by several law enforcement officers, including Terrance Carraway. App. 208, l. 14 – 212, l. 10. While Petitioner was being interrogated by the officers, he supposedly made a statement about how Creel had been shot. At that time, the officers did not know how Creel had died.[1] App. 238, ll. 4 – 13. Specifically, Carraway claimed that Petitioner said: "I wouldn't shoot [Creel]." App. 440, ll. 13 – 21.

Trial counsel made a pretrial motion to exclude the statement allegedly made by Petitioner to law enforcement on the grounds that the statement was obtained prior to Petitioner being informed of his Miranda[2] rights and because Petitioner was intoxicated when he gave the statement. App. 40, ll. 14 – 20. The trial judge proceeded to hold a Jackson v. Denno[3] hearing to determine the admissibility of Petitioner's statement. App. 41, ll. 19 – 25.

Terrance Carraway with the Florence City Police Department testified at the Denno hearing. Carraway stated that he responded to Petitioner's residence in reference to a body being discovered in the trunk of a vehicle there. App. 42, l. 17 – 43, l. 7. Carraway recalled that Petitioner was on scene at the time but was transported to the police department to be interrogated because he was "the person of interest." App. 43, ll. 8 – 25. Carraway admitted that

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1 It was later determined through an autopsy of Creel's body that she died from a gunshot wound to her head. App. 305, ll. 4 – 19.

2 Miranda v. Arizona, 384 U.S. 436 (1966).

3 Jackson v. Denno, 378 U.S. 368 (1964).

Petitioner was intoxicated and referred to him as "walking drunk." However, Carraway claimed that Petitioner "appeared" to understand what the police were saying. App. 44, ll. 6 – 25.

Petitioner was taken into a conference room at the police station where three law enforcement officers were present to assist with the interrogation. App. 45, l. 7 – 46, l. 11. Carraway admitted that Petitioner was not read his Miranda rights and he claimed that it was "[b]ecause he was not under arrest." App. 46, ll. 15 – 24. Carraway recalled that during their interrogation of Petitioner, Petitioner stated that "[he] wouldn't have shot [the victim]." App. 48, ll. 9 – 15. After Petitioner made this statement, Carraway then read him his Miranda rights and Petitioner refused to speak to law enforcement any further. App. 50, l. 19 – 52, l. 19.

On cross-examination, Carraway admitted that when he arrived on scene at Petitioner's residence, Petitioner was handcuffed and detained inside of a police car. Petitioner was handcuffed because a body had just been discovered in the trunk of a car on his property. App. 53, l. 17 – 54, l. 25.

Larry Drayton with the Florence City Police Department also testified at the Denno hearing. Drayton testified that he first met with Petitioner at the police station where he had already been transported from the scene by other officers. App. 56, l. 12 – 58, l. 1. Petitioner was in handcuffs initially, but Drayton ordered the handcuffs be removed when he arrived. App. 58, l. 2 – 59, l. 5. Drayton described Petitioner as being in "investigative detention" at that time. App. 59, ll. 6 – 10.

Drayton also acknowledged that the officers did not read Petitioner his Miranda rights before questioning him: "There was no reason to Mirandize because it was basic interviewing." App. 60, ll. 1 – 8. Drayton recalled that the officers questioned Petitioner on his relationship with the victim and the circumstances regarding the last time he saw her. App. 60, ll. 10 – 18.

Drayton then claimed that Petitioner "admit[ted] to taking part in the crime" and at that point Carraway decided to read Petitioner his Miranda rights. App. 60, l. 22 – 61, l. 21. After Petitioner was read his Miranda rights, he declined to speak with the officers any further and was arrested for murder. App. 62, l. 10 – 63, l. 21. Drayton admitted that Petitioner was never told that he was free to leave. App. 65, ll. 2 – 18.

Lastly, Charles Hobgood testified at the Denno hearing that he was one of the first officers to arrive at Petitioner's residence in response to the missing person report. App. 69, l. 7 – 70, l. 8. Hobgood was present when the trunk of the car was opened revealing the victim's body. Hobgood immediately detained Petitioner, handcuffed him and placed him into a patrol vehicle. App. 70, l. 9 – 71, l. 11. Hobgood admitted that the officers did not read Petitioner his Miranda rights. App. 71, ll. 12 – 19. Hobgood further admitted that Petitioner was not free to leave once he was detained. App. 73, ll. 6 – 16.

Trial counsel moved to suppress the statements made by Petitioner because at the time Petitioner gave the statements he was detained and was not given his Miranda warnings. App. 75, ll. 15 – 25. The solicitor responded that because Petitioner was in investigative detention and not under arrest, his statements were admissible despite the failure of the officers to read Petitioner his Miranda rights. App. 76, ll. 3 – 19. Ultimately, the trial judge ruled that Petitioner's un-Mirandized statement was admissible. App. 80, ll. 24 – 25. The trial judge stated:

> I'm [going to] allow the statement. I think . . . it was reasonable under the circumstances to take him from the scene to conduct the . . . interview. The questions that were asked according to testimony that I heard, were generalized questions as far as information gathering. They did not seem to be of an interrogating type, and I think it . . . fits under the law.

App. 82, ll. 10 – 17.

Trial counsel renewed his objections to Petitioner's statements during the testimony of both Drayton and Carraway during the trial. The trial judge again ruled that Petitioner's un-Mirandized statements were admissible. App. 235, ll. 4 – 20; app. 438, l. 7 – 439, l. 6.

On direct appeal, Petitioner was represented by Robert Pachak of the Office of Appellate Defense. App. 526. Petitioner raised the following issue in his appeal:

> Whether the trial court erred in refusing to suppress evidence seized from appellant's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant?

App. 529. Pachak did not raise the issue of whether the trial court erred in allowing Petitioner's un-Mirandized statement that he would not have shot the victim into evidence over trial counsel's repeated objections.

The Court of Appeals found that the trial judge's ruling on the search issue was "inadequate for appellate review" and therefore, remanded Petitioner's case and ordered the trial court to determine:

> (1) [W]hether [Petitioner] had a legitimate expectation of privacy in the trunk of Creel's car,
> (2) whether [Petitioner] consented to the search, and
> (3) if the police violated [Petitioner's] Fourth Amendment rights, whether the exclusionary rule applies.

State v. Bruce, 402 S.C. 621, 622, 741 S.E.2d 590, 591 (Ct. App. 2013); App. 558 – 562. The Court of Appeals further instructed the trial court that if it found a Fourth Amendment violation and that the evidence should have been suppressed, to then determine whether such error was harmless. App. 562.

Petitioner and the state both filed petitions for a writ of certiorari to this Court and both petitions were granted. App. 583 – 657. This Court reversed the Court of Appeals and affirmed Petitioner's conviction. State v. Bruce, 412 S.C. 504, 772 S.E.2d 753 (2015); App. 727 – 735.

Petitioner then sought review by the United States Supreme Court which was denied. App. 736 – 756.

Petitioner filed his PCR application on September 19, 2016. App. 757 – 830. The state filed its return on February 6, 2017. App. 831 – 838. An evidentiary hearing was held on November 6, 2018 before the Honorable D. Craig Brown. App. 839. Petitioner was represented by Jonathan Waller and the state was represented by Samuel Key. App. 839. Testifying at the hearing were Petitioner and Scott Floyd.[4] App. 840. Petitioner's appellate counsel did not testify at the hearing. However, Petitioner testified that he never spoke to his appellate counsel about his appeal. App. 854, ll. 2 – 11.

At the conclusion of the PCR hearing, Waller made the following argument:

> Your Honor, based on the testimony of [Petitioner] regarding any issues involving his appeal and the fact that he . . . never talked to the lawyer that handled his appeal about it, I would make a motion to Rule 15 (b)[ ] to amend his application to conform with the evidence to raise an allegation of ineffective assistance of appellate counsel regarding the statement that was made.
>
> Your Honor, [trial counsel] *I think did an admirable job of challenging that statement*, . . . his motion begins on page 40 of the transcript. Your Honor, [Petitioner] upon discovery of the body of Ms. Creel, was placed [in] investigative detention. He remained [in] investigative detention for several hours until he was finally transported to – he was told he wasn't allowed to leave – transported to a conference room across the street at the City-County Complex still in handcuffs with three investigators, was never told he was free to leave and then was questioned for a few more hours and, ultimately, gave a statement to law enforcement and that's when they decided to read him his Miranda rights.
>
> At the trial during the pretrial hearings on the matter[,] law enforcement repeatedly kept saying that the techniques they use[d] were interview techniques versus interrogation techniques and that's why the need for Miranda did not trigger. [Trial counsel],

4 Petitioner's trial counsel, Jack Lawson, had died by the time of the PCR hearing. Scott Floyd had a very minor role in assisting Lawson at Petitioner's trial. App. 855, l. 9 – 858, l. 17.

> throughout the course of the trial, I think did a very good job of questioning both his detention and whether he was free to leave as well as how he was questioned and the type of questioning. Judge, I think that the, when you get into the types of questioning I don't, I think you're splitting hairs on what they're asking you. Three . . . law enforcement officers ask him questions about the incident and about what was going on without him being Mirandized.
>
> Your Honor, *Judge Russo ultimately determined that the statement could come in and Your Honor that wasn't brought up on appeal. I believe that, that is a more meritorious issue than was raised on appeal which was the search of the residence then, ultimately, the vehicle*.

App. 864, l. 4 – 865, l. 18 (emphasis added). The assistant attorney general objected to counsel's Rule 15 (b) motion regarding a new claim of ineffective assistance of appellate counsel. The attorney general argued that before the PCR judge could make a finding of ineffective assistance of appellate counsel, appellate counsel would need to have testified at the hearing. App. 867, l. 19 – 868, l. 9.

The PCR judge took the matter under advisement and ultimately denied Petitioner's application for relief in a written order. App. 870 – 886. The judge's written order made a finding that trial counsel was not ineffective because he "properly preserved the arguments regarding [Petitioner's] statements for appellate review." The PCR judge did not address PCR counsel's Rule 15 (b) motion or make any findings of fact or conclusions of law regarding whether appellate counsel was ineffective in failing to raise this issue on direct appeal.[5] App. 881.

This petition for writ of certiorari follows.

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5 PCR counsel filed a Rule 59 (e), SCRCP motion but only addressed the PCR judge's ruling on the search issue. App. 887. The PCR judge denied counsel's Rule 59 (e), SCRCP motion. App. 889 – 892.

ARGUMENT

This case should be remanded for a new PCR hearing or in the alternative, findings of fact and conclusions of law on whether appellate counsel was ineffective for failing to raise Petitioner's extremely meritorious objection to the admissibility of statements Petitioner made to law enforcement while in their custody, and before they read him his *Miranda* rights, since trial counsel had properly preserved that objection for appellate review and appellate counsel did not raise that issue in Petitioner's direct appeal.

In order to prove ineffective assistance of counsel, Petitioner must show that "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); 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.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it 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) citing Strickland, 466 U.S. at 688. "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) citing Strickland, 466 U.S. at 668.

Section 17-27-80 of the South Carolina Code (2014) requires the PCR court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." The South Carolina Rules of Civil Procedure, which apply to PCR hearings, also

mandate that lower courts "find the facts specially and state separately its conclusions of law thereon." Rule 52 (a), SCRCP. "The PCR court's general denial of all claims not specifically addressed in the PCR court's order does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law." Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (internal quotations omitted).

This Court held in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019), that the PCR court's failure to make specific findings of fact and conclusions of law in its order regarding one of the issues raised by Fishburne required a remand for the PCR court to issue an amended order. The Court stated, "we again stress that PCR orders must be prepared in compliance with section 17-27-80 of the South Carolina Code (2014) and Rule 52(a) of the South Carolina Rules of Civil Procedure." Id. at 508, 832 S.E.2d at 585. The Court reached this conclusion even though Fishburne's PCR counsel failed to file a motion pursuant to Rule 59(e), SCRCP requesting the PCR court to make a specific ruling on the unaddressed issue. Id. at 515-516, 832 S.E.2d at 589.

Rule 15 (b), SCRCP allows a party to amend their pleadings to conform to the evidence presented. This rule further provides:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended *and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits*.

Rule 15 (b), SCRCP (emphasis added). In this case, Petitioner's PCR counsel made a motion pursuant to Rule 15 (b), SCRCP to amend the pleadings to conform to the evidence presented at the hearing which showed ineffective assistance of appellate counsel. The attorney general's only objection was that Petitioner already had an opportunity to amend his pleadings and that

appellate counsel's presence and testimony were necessary for the judge to make a finding of ineffective assistance of appellate counsel. The attorney general did not show how such an amendment to the pleadings would prejudice the state's defense to Petitioner's claims, nor did he contest that the evidence presented at the hearing would support a claim of ineffective assistance of appellate counsel.

The judge's written order of dismissal completely ignored PCR counsel's Rule 15 (b), SCRCP motion and instead only made a finding that *trial counsel* was not ineffective in failing to preserve Petitioner's Miranda issue for direct appeal. However, PCR counsel made it clear to the judge he was not asserting that trial counsel failed to preserve the Miranda issue for direct appeal. On the contrary, PCR counsel clearly argued to the PCR judge that trial counsel did in fact preserve the issue for direct appeal but that appellate counsel had failed to raise it. Furthermore, as will be argued below, Petitioner was prejudiced by appellate counsel's failure to raise his Miranda issue on direct appeal because it was an extremely strong issue which was very likely to succeed on the merits.

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Supreme Court of the United States held: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. The Court announced what are now commonly referred to as a suspect's Miranda rights: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any

statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id.

"Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). In determining whether a suspect is in custody, the subjective views of the suspect and the officers are irrelevant. Stansbury v. California, 511 U.S. 318, 323 (1994). The relevant inquiry is whether a reasonable person in the suspect's position would have felt that he was free to leave. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

If a suspect is determined to be in "custody," the next inquiry is whether he is being "interrogated." In Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980), the Supreme Court held that "interrogation" for Miranda purposes included "questioning or its functional equivalent." The Court elaborated: "[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id.

In this case, Petitioner was handcuffed and placed into a police vehicle in response to three law enforcement officers discovering the body of Petitioner's dead girlfriend in the trunk of her car which was parked on Petitioner's property during a welfare check. Furthermore, Petitioner had just told the officers that he and his girlfriend had an argument several days earlier and he had not seen her since that time. However, Petitioner's girlfriend's cell phone and car keys were on a table inside Petitioner's house. Petitioner was, as a matter of fact, not free to leave.

Further, Petitioner was then transported from his house to the police station while still in handcuffs and taken into an interrogation room. Petitioner did not go to the police station

voluntarily of his own accord. Any suggestion that Petitioner would have been free to leave after the discovery of his dead girlfriend's body in the trunk of her car on his property, followed immediately by his being placed in handcuffs and taken to the police station is, respectfully, absurd. There was no doubt whatsoever that Petitioner was in "custody" for Miranda purposes.

The officers in this case repeatedly referring to their interaction with Petitioner as being an "interview" and not an "interrogation" was immaterial and misleading. "Interrogation" for purposes of Miranda has been defined by the Supreme Court of the United States as "questioning." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). The officers openly admitted they were questioning Petitioner about his relationship with Creel and the circumstances of when he last saw her. Given that this questioning was taking place in the context of her dead body having been just discovered on his property, the officers certainly should have reasonably expected their questions to elicit incriminating statements from Petitioner.

Further, the impact of Petitioner's subsequent statement that he "would not have shot Creel," cannot be overstated. The officers did not know how Creel died and they each testified that they could not tell the manner of death by seeing her body in the trunk. This was exactly why the officers interpreted Petitioner's alleged statement as a confession, because only the killer would have known that Creel was shot.

The record shows that trial counsel made a pretrial motion to exclude Petitioner's un-Mirandized statement to law enforcement and renewed his objection at the time the state sought to introduce this statement before the jury. App. 40, ll. 14 – 20; app. 235, ll. 4 – 20; app. 438, l. 7 – 439, l. 6. Inexplicably, appellate counsel did not raise this very meritorious issue on direct appeal. There was nothing appellate counsel's testimony could have added to justify or excuse

his complete failure to raise this issue on appeal. There can be no strategic reason for such a failure. Furthermore, even if the attorney general was correct in asserting that appellate counsel's testimony was necessary before the PCR judge could make a finding of ineffective assistance of appellate counsel, the proper remedy was a continuance in order to procure such testimony, not an outright dismissal of Petitioner's claim. See Rule 15 (b), SCRCP (addressing a motion to amend the pleadings at late stages in the proceedings: "The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence").

The Miranda issue was the strongest issue that Petitioner had for his direct appeal and appellate counsel's failure to raise this issue constituted ineffective assistance of appellate counsel. The order of dismissal completely ignored Petitioner's allegation of ineffective assistance of appellate counsel which was duly raised by PCR counsel in his Rule 15 (b), SCRCP motion. As this Court stated in Fishburne v. State:

> [B]ecause the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.

Fishburne, 427 S.C. at 516, 832 S.E.2d at 589. This is one of the extremely rare cases in which this Court should remand to the PCR Court and order it to comply with S.C. Code Ann. §17-27-80 and Rule 52, SCRCP by making findings of fact and conclusions of law regarding Petitioner's ineffective assistance of appellate counsel claim. See Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2020.