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STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM DORCHESTER COUNTY
The Honorable Doyet A. Early, Circuit Court Judge

S.C. SUPREME COURT

429 S.C. 253, 838 S.E.2d 1
Opinion No. 5702

THE STATE,.....RESPONDENT

v.

EDWARD PRIMO BONILLA,.....PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2016-001725

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PETITIONER'S QUESTION PRESENTED

1. Whether the Court of Appeals erred by holding that a direct appeal was not the proper mechanism for petitioner to challenge the trial court's ruling that petitioner gave defense counsel his "informed consent" to reveal the location where the decedent's body was located, since petitioner had the right to have the trial court's erroneous ruling heard on direct appeal, the record was adequately developed for appellate review, and post-conviction relief was not a co-equal meaningful avenue of relief where it was limited to an allegation of ineffective assistance of counsel under the *Strickland v. Washington*, 466 U.S. 668 (1984) standard which cannot address the propriety of the trial judge's ruling on "informed consent"?
2. Whether the Court of Appeals erred by holding that petitioner gave defense counsel his "informed consent" to reveal the location where the decedent's body was located where the testimony during the suppression hearing revealed defense counsel thought there was "no reasonable alternative" to his "strategy" to reveal the location of the body under the circumstances, and that petitioner only acquiesced in trial counsel's plan because he thought he had no alternative?

RESPONDENT'S COUNTER ARGUMENT OF QUESTION PRESENTED

1. Did the Court of Appeals err in holding that they are not the proper mechanism for making a ruling regarding the decision of the trial court that the Petitioner gave "informed consent" in allowing his counsel to reveal the location of the victim's body?
2. Did the Court of Appeals err in holding that the trial court was proper in determining that the Petitioner gave "informed consent" before informing the authorities of the location of the victim's body?

STATEMENT OF THE CASE

On August 11, 2015, Petitioner was convicted by a jury of his peers of the offense of murder. Upon conviction, the Petitioner appeared before the Honorable Doyet A. Early and received a sentence of a period of incarceration for the remainder of his natural life. (R. p. 620 lines 14-16)

During trial, the State presented evidence that the Petitioner killed the victim and then buried her body in a shallow grave in Harleyville, South Carolina. At the time of his arrest the location of the victim's body was only known by the Petitioner. While the Petitioner was an inmate within the Dorchester County Jail he spoke to his attorney regarding possibly informing law enforcement of the location of the victim's body. His attorney informed him of the advantages and disadvantages in releasing this information. He was later driven to the Sheriff's Department where he met with his counsel for about twenty to forty minutes. (R. p. 13 lines 14-15) After this discussion he informed his counsel where the body could be located. After receiving this information his attorney informed the authorities of the location given to him by the Petitioner. Sheriff's deputies conducted a search in the wooded area, after searching a couple days, her body was discovered partly buried in a shallow grave. Prior to trial the Petitioner denied that he gave "informed consent" as to the location of the body. Since his original attorney might be called to testify, he decided to resign from the case. The Petitioner was later appointed another attorney.

A motion was made by the Petitioner for the court to exclude the information given to his attorney, due to the fact it was a breach of the attorney client confidentiality. The Petitioner argued that he never gave "informed consent" allowed pursuant Rule 1.6 of the rules of professional conduct. A hearing was held pre-trial so the trial court could decide this motion.

During this hearing the Petitioner's former attorney Mr. Mark Allen Leienburger testified. He stated that he was not initially informed as to the location of the victim body, he did inform the Petitioner that due to their strategy, it would be wise to inform the authorities. (R. p. 14 lines 11-14) The Petitioner was brought to the Sheriff's Department where he met with his attorney. On his attorney's ipad he revealed to him where the body could be located. Mr. Leiendecker testified that after receiving this information he showed it to the lead investigator. (R. p. 12 lines 15-18)

During this pre-trial hearing the Petitioner testified that he was unaware that he was going to be transported to the Sheriff's Department to speak with his attorney in order to reveal the location of the body. (R. 22 lines 6-8) He stated that once he got there he felt that he was placed in a corner, that everything was already in motion, and he could not back out. He felt that he had no choice but to inform them as to the whereabouts of the body. (R. p. 25 lines 10-14) During cross-examination he testified that he was already on board once he left the county jail and was transported to the sheriff's department. (R. p. 28 line 6)

At the conclusion of this pre-trial hearing the trial judge determined that first, you must determine whether or not consent was given, and second, was consent informed. It was determined by the trial court that Petitioner's counsel went over all the benefits and potential harm that would be bestowed upon the Petitioner after disclosing the whereabouts of the victim. The victim even testified that he was "on board" when his lawyer went to talk to the authorities. He found that the testimony of Mr. Leiendecker was more credible, while the Petitioner's testimony was based on assumptions and speculation. He found that the disclosure was not in violation of rule 1.6, so disclosure could be revealed during their case in chief. (R. p. 31 line 11 – p. 32 line 1)

While serving his sentence the Petitioner filed a notice of appeal before the South Carolina Court of Appeals. Within his notice of appeal the Petitioner argued that the trial Court erred in allowing evidence regarding his counsel informing the authorities of the location of the body. The Petitioner also argued that there was no probable cause to search the vans of his employer; that inaccurate information on the affidavit invalidated the search warrant; and, the trial court erred in failing to grant the defendant an in camera hearing on the investigators qualifications regarding blood testing.

On December 31, 2019, the Court of Appeals issued an opinion. Within this opinion the Court decided that a direct appeal is not the proper mechanism for the Petitioner to challenge the trial court's finding that he gave "informed consent," prior to his attorney disclosing the location of the victim's body. The Court also decided that evidence in the record supports the circuit court's finding that the attorney had "informed consent" to disclose the location of the victim's body; that probable cause existed to seize the employment vans and the Petitioner's mother's vehicle; that inaccurate information on the search warrant affidavit did not invalidate the search warrant; and, any error committed by the trial court in failing to grant the Petitioner an in camera hearing relating to the qualifications and reliability of an investigator's testimony regarding blood testing was harmless. *State v. Bonilla*, 429 S.C. 253, 838 S.E.2d 1 (2019)

The Petitioner now request a writ of certiorari seeking review from this Court. Within this petition the Petitioner only raises the decision of the Court of Appeals relating to the release of confidential information from his attorney to law enforcement.

The Respondent argues that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court rule 242, so this petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

Pursuant to rule 242 of the South Carolina rules of the Appellate Court, a writ of certiorari is not a matter of right, but a sound judicial discretion and will be granted only when there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered.

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 (b)(1-5) SCACR

The Petitioner argues that the Court of Appeals erred in deciding that this was not a proper mechanism to bring this direct appeal. The Petitioner further argues that the trial court erred in deciding that he gave "informed consent" prior to the release of this information. Pursuant to South Carolina law the Court of Appeals can only use the exclusionary rule against law enforcement. Any accusations regarding the wrongdoing of a defendant's counsel should be raised through post-conviction relief. The Court of Appeals also cannot reverse the decision of the trial court relating to the reliability of a witness unless it was clearly erroneous.

In the present case the trial court was correct in their decision regarding the "informed consent" given by the Petitioner to his counsel for the release of the information relating to the

location of the victim's body. The Court of Appeals was also correct in ruling that a direct appeal is not a proper mechanism for this cause of action. This petition should be subject to dismissal.

STATEMENT OF THE FACTS

The Petitioner and the victim met on the social media dating site meetme.com. They then communicated for a while on "kik." On April 3, 2015, the Petitioner and the victim decided to go on a date. The Petitioner decided that they should go to a bonfire/cookout at his brother's residence. They arrived at around 9:30pm and left around midnight. Video cameras at the Sunoco gas station recorded the victim leaving the station and entering the Petitioner's vehicle at 12:11am.

The next morning the victim mother, whom she lived with, noticed the victim did not return home. She called the victim's sister who came over to their house. Since the victim and her mother shared cell phones they checked her cell phone to determine who she had recently spoken to. They recovered "kik" messages with a person nicknamed "E-money Bon," the Petitioner's screenname. The last message they recovered was at 3:29am that morning, it was an apology from the Petitioner for leaving the victim at a gas station because she was intoxicated. The victim's sister began texting the petitioner and getting frustrated because he was not responding. (R. p. 109 lines 10-20) He finally responded, and informed them of his name. When they asked about the victim's whereabouts, he expressed to them that he left her in front of the Summerville mobile home park and he did not know what happened to her afterwards. (R. p. 110 lines 24-25)

Upon speaking with the Petitioner, the victim's family decided to file a missing person's report at the Dorchester County Sheriff's Department. (R. p. 111 line 19 – R. p. 112 line 2) They made screenshots of all of the messages the Petitioner made with the victim and provided them

to the authorities. The authorities later contacted the Petitioner who informed them that he left the victim on the side of the road around 2:00am. (R. p. 124 line 6) They asked him to come to the station to make a statement. He came in the next day and informed them that he left the victim in the woods after she had to use the bathroom a second time. He said that he did that because she was intoxicated and getting hard to handle. He was asked if he was employed and he informed them that he was unemployed due to an ankle injury.

Two weeks later the Petitioner's brother's girlfriend contacted the authorities. She was worried that the Petitioner had something to do with the victim being missing. She told the authorities that she attended the bonfire and Petitioner and victim both left around midnight. She also informed them that the Petitioner had a job working with his brother at Cauble flooring. The authorities then got in contact with the owner, Robert Cauble who did inform them that the Petitioner did work for him. He also informed them that Petitioner had access to two work vans, a GMC and a Ford Econoline. The authorities requested consent to search these vans. At that time the Petitioner also contacted Mr. Cauble informing him that he left his cell phone inside the van and wanted to come back to retrieve it.

While the authorities were there the Petitioner arrived to retrieve his cell phone. They questioned the Petitioner in front of Mr. Cauble asking why he lied to them and told them that he was unemployed. At that time the Petitioner was arrested and charged with obstruction of justice. The authorities also took both vans to search the interior for any evidence of the victim's disappearance. During the search of the vans they discovered blood in the rear, near the passenger side. (R. p. 203 line 23 – R. p. 204 line 2) The Petitioner was then charged with murder. The whereabouts of the victim's body was still unknown.

The Petitioner was originally represented by Mr. Mark Leiendecker, the Public Defender of the First Judicial Circuit. While he was being held at the Dorchester County County Jail, the Petitioner informed his attorney that he accidentally struck the victim with his vehicle. Mr. Leiendecker informed the Petitioner that the only way to prove that this was an accident is that the body be recovered and an autopsy completed on the victim. The Petitioner agreed to meet at the Sheriff's Department, while there, Mr. Leiendecker met with Petitioner in a conference room for about twenty minutes. During that time the Petitioner used Mr. Leiendecker ipad to reveal where he buried the victim's body. Mr. Leiendecker showed the authorities the ipad revealing the location of the body.

A search of the area was conducted and they eventually found the victim's remains. The remains were buried in a shallow grave about two and a half feet deep. The body was nude from the waist down with her shirt and bra pulled up to her neck. (R. p. 373 lines 2-14) There was black electrical tape around her neck and wrists. (R. p. 373 lines 23-24, R. p. 377 lines 22-25)

An autopsy was performed by Dr. Nicholas Batalis, forensic pathologist at the Medical University of South Carolina. He determined that there was extensive decomposition of the body, making it clear that she was dead for a long period of time before discovery. (R. p. 372 lines 11-13) Due to this decomposition he was unable to determine if there was any sexual assault or an exact cause of death. He determined that she could have possibly been strangled due to fractures of both sides of her thyroid cartilage which is common with manual strangulation, however, he could not pronounce that is an exact cause of death. (R. p. 382 lines 2-5) He suspected asphyxia by way of strangulation around the neck, due to the tape wrapped around the neck and the blunt force injuries; however, he determined that the cause of death was homicidal violence. (R. p. 488 lines 4-11)

ARGUMENT

The Court of Appeals correctly decided that they did not have the ability to decide because a direct appeal is not the proper mechanism for the Petitioner to challenge the trial court's finding that Petitioner gave informed consent to his attorney to disclose the location of the victim's body.

Petitioner argues that the Court of Appeals erred in deciding that a direct appeal was not the proper mechanism to challenge a finding that the trial court gave "informed consent" for the release of the information regarding where the victim's body could be found. During a pre-trial motion the Petitioner argued that his original counsel failed to receive "informed consent" prior to releasing information regarding where Petitioner hid the victim's body. He argued that his counsel violated Rule 1.6 of the rules of professional conduct.

Rule 1.6 of the rules of professional conduct specifically states:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted in paragraph (b).

Rule 1.6 RPC

In order for that attorney to reveal privileged information, it must be by "informed consent."

Pursuant to the South Carolina rules, "informed consent" includes:

The agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risk of and reasonably available alternative to the proposed course of conduct.

Rule 1.0(g), RPC, Rule 407 SCACR

The Petitioner argues that the court erred in not recognizing that there was insufficient "informed consent." This would be a matter that the Petitioner is requesting an initial appeal regarding a statement given to his attorney and not law enforcement. The exclusionary rules sole purpose is

to deter future constitutional violations by law enforcement and where suppression fails to yield 'appreciable deterrence' exclusion is 'clearly unwarranted.' *State v. Brown*, 401 S.C. 82, 92, 736 S.E.2d 263, 268 (2012). This was not a custodial interrogation where this information was given by the Petitioner to law enforcement. This was information given to his attorney that was later relayed to law enforcement. If the Petitioner has a cause of action against his counsel, that should be addressed through post-conviction relief initially and then possibly on appeal to the court of appeals upon a final determination.

In the United States Supreme Court case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) the Court determined the standards that must be met in order for a counsel's representation to be deemed ineffective. There is a two pronged test in evaluating allegations of an ineffective assistance or counsel. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Washington*, at 466 U.S. at 687. The defendant must also reveal that counsel's deficient performance prejudiced him such that, but for counsel's unprofessional errors the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) The Petitioner made the argument that his case would have been different if not for his counsel revealing the privileged information disclosing the location of the victim's body. This is an argument regarding the actions of his counsel and not an action regarding a violation of the constitution by law enforcement. Since this is an argument against

the actions of his attorney and not law enforcement relief must be sought through post-conviction relief.

Within their opinion the Court of Appeals stated that through post-conviction relief, evidence not placed in the record can still be considered. As it stands now only evidence placed in the record can be considered by the Court of Appeals. The Court of Appeals does not sit as a trial court to receive evidence on disputed issues of fact; their function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court. *Sanders v. Salley*, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). No evidence was introduced during trial revealing why counsel provided this evidence, it just revealed that it was given to the law enforcement. In a post-conviction relief action, further evidence could be provided revealing a possible violation of privilege. The post-conviction relief court may receive proof of affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for a hearing. S.C. Code Ann. §17-27-80 (2019). Post-conviction relief was designed for an inmate to identify any mistakes, or purposeful errors that has cause that inmate to be convicted. This is the only avenue that would be available and not a direct appeal. It must be done through post-conviction relief, this is the most appropriate measure to address the release of confidential information by the Petitioner's counsel. The decision of the Court of Appeal's was correct, there exists no error. This petition for certiorari should be subject to dismissal.

The Court of Appeals did not err in affirming the decision of the trial court that the Petitioner gave "informed consent" to his attorney to reveal the location of the victim's body.

The Petitioner also argued that the Court of Appeals erred in deciding that there was sufficient evidence in the record supporting the trial court's decision that "informed consent" was given prior to the release of the location of the body.

In making his decision the trial court applied the ninth circuit court of appeals decision of *McClure v. Thompson*, 323 F.3d 1233 (2003). In *McClure*, the court decided that, “the professional standard that allows disclosure of confidential communications when ‘the client consents after consultation’ has two distinct parts: consent by the client and consultation by the counsel.” *McClure*, 323 F.3d at 1243. There was a pre-trial hearing where the Petitioner requested the trial court to exclude confidential evidence due to the Petitioner not giving “inform consent.” The evidence presented revealed that the Petitioner was informed, and decided to allow this information to be released to law enforcement.

During this pre-trial motion the Petitioner’s original attorney Mark Allen Leiendecker testified as to what occurred prior to the release of this information to law enforcement. Mr. Leiendecker testified that he informed the Petitioner that there was a risk in giving this information. He informed the Petitioner of the fact it would be impossible for him to deny he knew what happened to the victim that night, that this would place him at the scene, and he would be facing further charges. (R. p. 16 lines 1-7) Mr. Leiendecker testified that he had several conferences with Petitioner but he never knew any information regarding the location of the victim’s body until it was given to him at the sheriff’s department. They discussed strategy and the reasons that it may be beneficial to the case and that there was no reasonable alternative. (R. p. 14 lines 11-14) But the Petitioner never disagreed he just asked questions. Mr. Leiendecker testified that he felt by the time he reported the information to law enforcement the Petitioner was on board and knew the reasons it could be beneficial to him. (R. p. 14 lines 18-21)

The Petitioner testified during this pre-trial hearing that he did discuss revealing the location of the body, but he just did not know that he was going to be brought to the police station to reveal this information. He stated that he felt that he was backed into a corner when he

was brought to the police station, (R. p. 22 lines 6-8) that he thought it was already in motion so he had to give them the information. (R. p. 25 lines 3-5) But he also testified that he thought it was the best course of action. (R. p. 26 lines 3-5)

At the conclusion of this hearing the trial court decided that they would believe the attorney over the Petitioner. The court found that the attorney's testimony was more credible than the Petitioner's, whose testimony was based on assumptions and speculation. The trial court found that not only did the Petitioner give consent for his counsel to make these disclosures as to where the body was located but he went over all the benefits that can be conferred upon disclosure as well as the potential harm. The court decided that based on testimony, and that consent was informed with full legal guidance with full cautionary explanation as to the benefits as well as harmful consequences of disclosure, hence making the consent informed. So the court decided to allow this information into evidence. (R. p. 31 lines 1-17)

The Court of Appeals found that the circuit court did not err in finding that the Petitioner gave his counsel his informed consent to disclose the location of the victim's body. *State v. Bonilla*, 429 S.C. 253, 276, 838 S.E.2d 1, 13 (2019). The Court of Appeals is bound by the circuit court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). There is no evidence in the record that reveals that this was an erroneous decision. Attorney Leiendecker testified that on multiple occasions he met with the Petitioner and explained the benefits as well as the detriments in relinquishing this information. He testified, that not only did the Petitioner understand but he was always on board. The Petitioner testified himself that he thought it was the best course of action. According to the record this was an informed decision. There was no other determination the court could have made than there existed "informed consent;" therefore, allowing this information to be released

to law enforcement was lawful. The decision of the trial court was not erroneous but lawful. The Court of Appeals made the proper decision affirming the decision of the trial court. This petition for writ of certiorari was should be subject to dismissal.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to reveal that the question presented warrants certiorari review. The Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court.

Respectfully submitted,

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