



In habeas corpus matters brought under the Sexually Violent Predator Act, the Supreme Court in *Matter of the Care and Treatment of Chapman* held “the more appropriate standard in these instances is the two-prong *Strickland* standard used to vindicate a criminal defendant's Sixth Amendment right to counsel.” *Chapman*, 419 S.C. 172, 184–85, 796 S.E.2d 843, 849 (2017).

The proper range of performance is whether the trial attorney provided representation within the range of competence required in a case of this nature. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984). Because of this, counsel’s performance is measured by its reasonableness under professional norms. And if trial counsel was indeed deficient, that performance must also have prejudiced Petitioner to the extent there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the trial would have been different. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

This habeas matter was based upon Petitioner’s jury trial in Greenville on May 20, 2014, where the jury returned a verdict committing Petitioner to the South Carolina Department of Mental Health for long term control, care and treatment. His attorney at the trial was R. Mills Ariail, of Greenville. The State’s expert witness was Dr. Marie E. Gehle of the Department of Mental Health, and in his defense Petitioner presented expert testimony from Dr. David Richard Price.

Evidence introduced included copies of the Supreme Court’s published opinion in *In re the Care and Treatment of Gonzalez*, 409 S.C. 621, 763 S.E.2d 210 (2014) and the Court of Appeals’ unpublished opinion in *Gonzalez*, Op. No. 2012-UP-003, 2012 WL 10826180 (S.C. Ct. App. filed January 4, 2012), a copy of the Supreme Court’s published opinion in *In re the Care and Treatment*

of Way, 410 S.C. 377, 764 S.E.2d 701 (2014) and the Court of Appeals' unpublished opinion in Way, Op. No. 2011-UP-268, 2011 WL 11734641 (S.C. Ct. App. filed August 24, 2011).

This Court granted the Petition for Writ of Habeas Corpus based upon trial counsel's failure to object to the State's questions regarding a doctor who examined the Petitioner but did not testify at trial.

During his direct testimony, Petitioner testified he was evaluated by "Dr. Bardoff" as a condition of his probation from a 1997 indecent exposure conviction. He stated Dr. Bardoff administered the same psychological test Dr. Gehle had administered, and he "never heard nothing else about it." (TT, pp 204-206)

During cross-examination, the State asked about Dr. Bardoff, and then asked Petitioner about another evaluation:

Q. Okay. Isn't it true that you had other evaluations as well by defense experts?

A. Not that I recall, ma'am.

Q. Isn't it true that Dr. Martin was retained by the defense for this trial to evaluate you as your expert?

A. Yeah, there should have been a red flag immediately with Dr. Martin. Because he knew you and says that he's been dealing with you two for quite some time, he knew y'all right away.

Q. Absolutely. He's an independent expert that testifies for the defense in all of these cases, doesn't he?

A. Right.

Q. But he's not here to testify for you, is he?

A. No, he's not here to testify for me.

Q. Okay.

A. Why is that, ma'am?

  
3

Q. You tell me.

A. I don't know.

(TT, pp 210-211).

During cross-examination of the defense's expert witness, Dr. Price, the State asked if he was aware of any opinions of other mental health professionals regarding Petitioner. He stated he thought Petitioner "had seen a Dr. Martin," but he could not recall. Dr. Price further testified he did not know Dr. Martin, nor did he know he had an outpatient sex offender treatment program and previously worked at the SVP treatment program (TT, pp 251-252).

Both Supreme Court opinions in *Way* and *Gonzalez* involved SVP proceedings, and changed the rule regarding cross-examination of an expert witness, but both were decided after Petitioner's trial. Petitioner's case is distinguishable from *Way* and *Gonzalez*, because the State did not argue any adverse inference from Dr. Martin's absence at trial, and there was no jury charge regarding the "missing witness" rule.

At the time of Petitioner's trial in May 2014, the "missing witness rule" in South Carolina was that if a party did not call an available witness on a material issue, it could be inferred that such testimony would have been adverse to the party. The Court of Appeals had issued unpublished opinions about this issue, in both *Way* and *Gonzalez*. *Gonzalez* was a Rule 220(b)(1), SCACR memorandum opinion that did not find error with such questioning.

In *Way*, the court did not find error with the questions the State had asked Way about his retained expert. It did find error where the State had argued to the jury that it could infer from the absence of Way's expert that the testimony would have been adverse to him, but that such error did not rise to the level of reversible error, given the "relevant and substantive evidence to support the jury's determination."



The Supreme Court's opinion in *Gonzalez* was filed September 3, 2014. It affirmed Gonzalez's commitment trial, but changed the missing witness rule: "[W]e hold today that a party's invocation of the missing witness rule should be limited to fact witnesses, and it should not be applied to opinion witnesses, particularly psychiatric experts." *Way*, filed November 12, 2014, adopted the same change.

Petitioner's trial was conducted in accordance with the law in effect at the time. In addition to general case law regarding the missing witness rule, Mr. Ariail would only have had access to the unpublished Court of Appeals' opinions in *Gonzalez* and *Way*, holding that cross-examination regarding the prior evaluation by Dr. Martin had been appropriate, or, if not appropriate, harmless error. Neither Court of Appeals opinions modified or altered the missing witness rule.

An attorney is not required "to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *see also Harden v. State*, 360 S.C. 405, 602 S.E.2d 48, 49 (2004). Mr. Ariail's failure to object to the questions about Dr. Martin cannot be deemed ineffective in light of the established law at the time of the trial.

Based on the foregoing, the Court concludes Mr. Ariail provided representation within the range of competence required in a case of this nature, based upon the law in existence at the time of Petitioner's jury trial. The next question is whether his performance prejudiced Petitioner to the extent there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different.

The Court concludes that even if the limited questions about Dr. Martin were improper, any such error was harmless beyond a reasonable doubt. In addition to evidence of his significant

history of sexual offenses, Dr. Gehle's testified regarding the basis for her diagnoses of Paraphilic Disorder (Blastophilia) and Anti-social Personality Disorder, which she stated is "an especially dangerous combination" making Petitioner likely to reoffend sexually. She testified Petitioner did not take responsibility for his sexual offenses even though he pleaded guilty to all of them, he reoffended while on probation from previous offenses, he offended against women who could readily identify him, some of his offenses were very impulsive (indicating an inability to control his behavior), and he did not believe he needed any sex offender treatment, which made it unlikely he would engage in treatment if not confined for it (TT, pp 61-112).

In addition, both *Gonzalez* and *Way* were cases in which the State's expert was the only expert witness at those trials. In this case, Petitioner presented Dr. Price, who testified Petitioner had no mental abnormality or personality disorder, was not likely to reoffend sexually, and did not meet the criteria for commitment as a sexually violent predator.

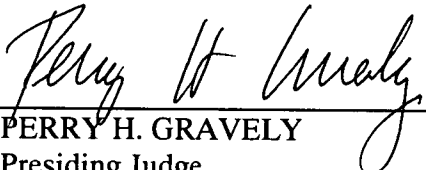
In light of all the evidence presented by both parties, the limited references to Dr. Martin were harmless, especially given the overwhelming evidence against Petitioner.

Accordingly,

IT IS HEREBY ORDERED that the Motion to Reconsider, Alter or Amend Judgment pursuant to Rule 59(e), SCRCF is granted as it relates to Item III of the Order of March 30, 2020, but the remaining findings of the Order are affirmed and not modified or altered by this Order.

IT IS FURTHER ORDERED that the Petition for Habeas Corpus relief is denied. AND

IT IS SO ORDERED.

  
PERRY H. GRAVELY  
Presiding Judge  
Court of Common Pleas

May 5, 2020