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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable J. Cordell Maddox, Circuit Court Judge

GILBERT EDWARD DAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001247

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel when he failed to interview Detective Griffin to discover that Griffin planned on making irrelevant and prejudicial allegations to the plea court that Petitioner was responsible for his wife's suicide from years of abuse?

STATEMENT

On October 19, 2017 Appellant pled guilty to burglary in the second degree and grand larceny before the Honorable Benjamin Culbertson. App. 1. Derek M. Bush represented Petitioner. Id. M. Bradley McMillian represented the state. Id.

Judge Benjamin accepted Petitioner's guilty plea as knowingly and voluntarily made. App. 18, ll. 15 – 20. Appellant was sentenced to twelve years' imprisonment for burglary in the second degree and ten years' imprisonment for grand larceny, running concurrently. App. 18, l. 21 – 19, l. 3.

On April 27, 2018, Petitioner filed an application for post-conviction relief (PCR) where he alleged that plea counsel provided ineffective assistance of counsel for failing to challenge the burglary charge on the grounds that Petitioner had consent to enter the building; failure to conduct mental evaluation or get "medical help" for Petitioner; and failure to interview Detective Griffin to discover what he was going to state at the guilty plea hearing. App. 21 – 27. On October 29, 2018, the state filed a return and a motion for a more definite statement. App. 28 – 35.

On January 21, 2019, Petitioner filed an amendment to his PCR application where he specified his allegations. App. 36 – 39. Petitioner explained that counsel should have interviewed Detective Griffin to discover that he planned to tell the plea court that Petitioner's wife killed herself as a result of Petitioner's years of abuse. Id. Petitioner also explained that he was an employee in the building he allegedly burglarized and plea counsel never explained to him the potential defense of consent to his burglary charge. Id.

On May 15, 2019, Petitioner's PCR hearing was held before the Honorable J. Cordell Maddox. App. 40. Arthur K. Aiken represented Petitioner. Id. Jacob Isenberg represented the state. Id.

In an order filed on June 25, 2019, the PCR court denied Petitioner relief. App. 91 – 106. The court found that plea counsel's investigation was not deficient because there was "nothing to suggest" that plea counsel had knowledge about what Griffin was going to say to the plea court. App. 91 – 106. Moreover, plea counsel credibly testified that the only way he could have learned about Griffin's testimony was to interview him and that it was not likely Griffin would have been forthcoming with plea counsel anyway. Id.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he failed to interview Detective Griffin to discover that Griffin planned on making irrelevant and prejudicial allegations to the plea court that Petitioner was responsible for his wife's suicide from years of abuse.

Relevant Facts

On the night of August 13, 2017, Petitioner allegedly unlawfully entered the City of Aiken Engineering and Utilities Building on Kershaw Street in Aiken. App. 9, l. 24 – 11, l. 25. A side door was allegedly “forced open” and the total amount stolen was, “somewhere in the neighborhood” of \$300,000. Id.

Petitioner “disclosed his involvement in everything” and helped recover \$272,000 worth of stolen equipment. Id. As a result of his cooperation, the state agreed to not charge Petitioner for the taking of the items he helped recover. Id.

During the guilty plea hearing, Plea counsel explained that Petitioner was an employee for the City of Aiken, but was “out on worker’s comp” at the time of the incident. App. 12, l. 9 – 13, l. 20. Petitioner spoke in mitigation at the plea hearing and explained that his wife killed herself six days after he was arrested and he was the sole provider for his step daughter. App. 13, l. 23 – 15, l. 3.

During the guilty plea hearing, detective Jason Griffin stated that he listened to jail phone calls from Petitioner to Petitioner’s wife where Petitioner directed his wife to not talk to the police and to hide various stolen items. App. 15, l. 14 – 16, l. 22. Griffin also improperly opined that *Petitioner’s wife killed herself because Petitioner was “abusive to her for several years.”* Id.

In response to that irrelevant and prejudicial statement from Griffin, plea counsel asked the court for permission to reply, but the court said “no.” App. 16, l. 25 – 17, l. 1. Plea counsel did not “object” and did not move to withdraw the plea.

During Petitioner’s PCR hearing, Petitioner testified that plea counsel provided ineffective assistance of counsel for failing to investigate by interviewing Detective Griffin on what he would say during sentencing at the guilty plea hearing. App. 48, l. 2 – 50, l. 19. Petitioner explained that plea counsel told him Detective Griffin would speak “good” on his behalf during sentencing. Id.

Petitioner also testified that the statements by Griffin had a “dramatic impact” on the plea court judge. App. 49, l. 25 – 50, l. 7. Petitioner attested that the judge’s face “turned red” and he “got real tight lipped,” after hearing Griffin blame Petitioner for his wife’s suicide. Id. He stated that he would not have pled guilty if he had known that Griffin would discuss the recorded jail calls and would blame Petitioner for his wife’s suicide to the plea court. App. 50, ll. 20 – 23.

Plea counsel testified at Petitioner’s PCR hearing as well. App. 58, l. 22. He stated that Petitioner already confessed to law enforcement before plea counsel became involved in the case. App. 71, ll. 8 – 19. He also stated that he had extensive negotiations with Detective Griffin regarding the immunity agreement for Petitioner and he believed that Griffin would speak favorably of Petitioner during sentencing because Petitioner provided “very valuable information” to the state. App. 65, l. 12 – 67, l. 25.

Plea counsel admitted he had no idea that Griffin would “inappropriately” blame Petitioner for his wife’s suicide. App. 76, l. 16 – 77, l. 13. He also admitted that he did not “verify” with Griffin about what he would say at the plea hearing and that it would have been “nice to know.” App. 76, l. 7 – 77, l. 13; App. 84, l. 24 – 85, l. 7. Plea counsel said he was

“shocked” when he heard Griffin’s comments. App. 82, l. 10 – 83, l. 5. Plea counsel testified that the recorded jail calls and Petitioner’s wife’s suicide were irrelevant to the guilty plea. App. 85, l. 24 – 86, l. 20. Plea counsel stated that once the court denied his request to reply to Griffin’s accusations, he did not object further because he thought it would be futile. Id.; App. 95.

Plea counsel believed that since the tapes of the jail phone calls to Petitioner’s wife were not exculpatory, the state did not have an obligation in discovery to turn them over. Id. Accordingly, plea counsel testified that the only way he could have learned what Griffin was going to say at the guilty plea hearing was to interview him before the guilty plea hearing, but there was no obligation for Griffin to tell plea counsel what he planned to say. Id.

The PCR court found plea counsel testified credibly that he did not know about the existence of the jail phone calls from Petitioner to his wife, nor did he know what Griffin was going to tell the plea court during sentencing. App. 97 – 98. The court also found that since the calls were not exculpatory, it was not mandatory for the state to turn them over to the defense prior to the guilty plea. App. 98 – 100.

Accordingly, the PCR court determined there was no guarantee that plea counsel interviewing Griffin before the guilty plea hearing would have uncovered the jail call recordings or Griffin’s plan to make unfounded and prejudicial comments to the plea court. Id. Therefore, the PCR court determined plea counsel not interviewing Griffin prior to the guilty plea hearing did not constitute deficient performance and it did not prejudice Petitioner. Id.

Discussion

At Petitioner’s guilty plea hearing, the investigating officer, Detective Jason Griffin injected unfounded and prejudicial allegations into the court’s sentencing considerations. App. 15, l. 14 – 16, l. 22. Griffin stated to the plea court that he listened to phone calls from Petitioner,

while he was incarcerated, to his wife where Petitioner told his wife to not cooperate with police and to hide various stolen items. Id. However, he then stated that Petitioner was responsible for his wife's suicide because he was "abusive to her for several years." Id.

Griffin made that egregious allegation without providing any support for it. It was evident the suicide allegation had a dramatic effect on the plea court judge as his demeanor visibly changed after hearing them. App. 49, 1. 25 – 50, 1. 7. Accordingly, plea counsel provided ineffective assistance of counsel for failure to conduct a proper investigation in Petitioner's case when he did not interview Griffin on what Griffin would say at the guilty plea hearing.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) this Court held that trial counsel failed to conduct a reasonable investigation into McKnight's death by child abuse case. Id. at 47, 661 S.E.2d 361. Although McKnight was not a death penalty case, this Court cited Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883, n. 8 (2006) and Wiggins v. Smith, 539 U.S. 510 (2003) for the principle that to provide effective assistance of counsel an attorney must conduct a reasonable investigation into "all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence introduced by the State," applies equally in the non-death penalty context. McKnight, at 46, 661 S.E.2d at 360.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Then Petitioner must show trial counsel's ineffective assistance prejudiced Petitioner case because, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is alleged, the applicant 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, 466 U.S. at 692.

In State v. Bagwell, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) the Court of Appeals held that Bagwell’s trial counsel was ineffective for failing to request for DNA testing of blood found at the crime scene. Id. at 268, 763 S.E.2d at 635. In Bagwell, there was an alleged burglary committed where the glass patio door was shattered and there was blood on the broken glass. Id. at 261-262, 763 S.E.2d at 631-632. The homeowner testified he saw Bagwell shortly after the alleged burglary and Bagwell was bleeding from his face. Id. Bagwell was convicted of first-degree burglary and sentenced to twenty years’ imprisonment. Id. at 263, 763 S.E.2d at 632.

At Bagwell’s PCR hearing, he argued that his attorney was ineffective for not testing the DNA from the blood at the scene to compare to Bagwell’s DNA. Id. Bagwell testified that his attorney never informed him that the state had blood samples to compare to at the time of his trial. Id. Additionally, Bagwell presented blood samples at his PCR hearing that showed his blood did not match the blood found at the scene. Id. Trial counsel testified at Bagwell’s PCR hearing that he did not pursue further investigation into the DNA evidence because the state “decided not to follow through with testing.” Id.

The Court of Appeals held Bagwell’s attorney provided ineffective assistance of counsel because, “the State used the [bloody] glass as circumstantial evidence of Bagwell’s guilt.” Id. at 266, 763 S.E.2d at 634. Additionally, the Court of Appeals held that Bagwell was prejudiced by trial counsel’s ineffective assistance because, “the only direct evidence linking Bagwell to the burglary was Armstrong’s testimony that he saw Bagwell exiting the apartment through the glass door... [and] the State referenced the broken glass door several times at trial to corroborate


Armstrong's testimony and infer Bagwell was inside the victims' apartment." Id. at 267, 763 S.E.2d at 634.

Plea counsel admitted at the PCR hearing that he was surprised by Griffin's remarks. App. 76, l. 7 – 77, l. 13; App. 84, l. 24 – 85, l. 7. Plea counsel also admitted he did not interview Griffin on what he was going to tell the plea court, and it would have been "nice to know" that Griffin was going to blame Petitioner for his wife's suicide. Id. Plea counsel testified that he tried to reply to Griffin's allegations, but the plea court told him "no," and he did not object any further because he believed it would be futile. App. 85, l. 24 – 86, l. 20.

Petitioner testified that the prejudicial comments by Griffin had a "dramatic impact" on the plea court judge as his demeanor visibly changed for the worse. App. 49, l. 25 – 50, l. 7. Petitioner also would not have pled guilty had he known that Griffin planned on telling the plea court Petitioner was responsible for his wife's suicide. App. 50, ll. 20 – 23; See Hill v. Lockhart, 474 U.S. 52, 59 (1985). Accordingly, plea counsel's failure to interview Griffin constituted deficient performance that prejudiced Petitioner because he would not have pled guilty had he known Griffin was going to blame him for his wife's suicide, and those inflammatory comments by Griffin caused the plea court to sentence Petitioner more harshly than he would have been had they not been said.

CONCLUSION

By reason of the forgoing arguments Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2020.