STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George M. McFaddin, Circuit Court Judge

ALEXANDER B. WILSON, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000693

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective in failing to object when Petitioner's brother gave his lay opinion that, based on his experience "working in mental health and dealing with a lot of different clients," Petitioner knew the difference between right and wrong when the sole issue before the jury was whether Petitioner was not guilty by reason of insanity or guilty but mentally ill of murder?

STATEMENT

In May of 2011, the Sumter County Grand Jury indicted Petitioner, Alexander "Bobby" Wilson, for murder, indictment #2011-GS-43-0698. On December 1, 2014, Petitioner proceeded to jury trial before the Honorable W. Jeffrey Young. Charles T. Brooks, III, represented Petitioner at trial. Ernest A. "Chip" Finney, III, and John P. Meadors prosecuted the case. The jury returned a verdict of guilty but mentally ill. Judge Young sentenced Petitioner to life in prison. A timely notice of intent to appeal was served and the direct appeal perfected. On June 22, 2016, the South Carolina Court of Appeals dismissed the appeal. State v. Wilson, Op. No. 2016-UP-310 (S.C. Ct. App. filed June 22, 2016).

On July 15, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on February 14, 2017. On November 15, 2017, an evidentiary hearing was held before the Honorable George M. McFaddin, Jr. Timothy Griffith represented Petitioner at the PCR hearing. Julie A. Coleman represented the State. In a written order signed March 20, 2018, Judge McFaddin denied relief and dismissed the application. A timely notice of intent to appeal was served on April 9, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to object when Petitioner's brother gave his lay opinion that, based on his experience "working in mental health and dealing with a lot of different clients," Petitioner knew the difference between right and wrong when the sole issue before the jury was whether Petitioner was not guilty by reason of insanity or guilty but mentally ill of murder.

The jury found Petitioner guilty but mentally ill of the fatal beating with a baseball of Petitioner's mother. Petitioner, who was sixty-three years old at the time of his trial, was diagnosed with schizophrenia when he was twenty-two years old. (App. p. 114, lines 6-14; App. p. 280, lines 6-12; App. p. 331, lines 5-6). Petitioner had been hospitalized numerous times for his psychiatric condition and had been committed several times between the crime in 2013 and his trial in 2014. (App. p. 280, lines 18-22). Petitioner received a social security check for his disability – schizophrenia. (App. p. 82, lines 20-24; App. p. 113, lines 19-21).

When interviewed by police the day after the incident, Petitioner stated that the woman who was killed was not his mother but instead someone pretending to be his mother. (App. p. 246, lines 1-5). At trial Petitioner admitted to killing "a woman" but testified that the woman was Elizabeth Wilson, not Elizabeth S. Wilson, Petitioner's adoptive mother and not Petitioner's real mother. (App. p. 336, lines 13-22). When asked who was the woman that was killed, Petitioner testified, "That was somebody that wanted to take control of the Wilson estate. This person got my driver, got, putting me and my bank account and obtained 400 dollars to get her a driver's license." (App. p. 336, line 23 – p. 337, lines 1-2). When asked why he killed her, Petitioner testified, "Well, because I heard a voice that say, Bobby, bring her to me, I know what wrong with her, I'll take care of you. And I hit her and she didn't say nothing then." (App. p.

337, lines 3-7). Petitioner testified that the voice he heard was that of his deceased father. (App. p. 337, lines 8-14).

At trial Petitioner presented expert testimony that he was insane at the time of the crime and not criminally responsible. (App. p. 289 lines 8-21). The expert testified that one of the ways that Petitioner's schizophrenia manifested was through Capgras Syndrome, an irrational belief that a familiar person has been replaced by an exact duplicate. (App. p. 281 line 19 – p. 2282, line 2). Due to his schizophrenia, Petitioner believed his mother "was a replacement, and was a threatening figure to him." (App. p. 282, lines 5-8). Additionally, the expert testified that Petitioner heard his deceased father instruct him to kill his mother and deliver her to him. (App. p. 285 lines 11-13).

The expert believed that Petitioner was not criminally responsible and testified, "I believe that at the time of the crime on November 29th, 2010, Mr. Wilson could not differentiate between legal and moral right for legal and moral wrong." (App. p. 289 lines 8-21). The State, however, presented an expert to testify that in her opinion, there was "no data to indicate that [Appellant] didn't know right from wrong" and that there was "insufficient data to indicate he was unable to conform his conduct to the requirements of the law." (App. p. 391, line 24 – p. 392, line 14; App. p. 397, line 10 – R. 398, line 7). The sole issue to be determined by the jury was whether Petitioner was not guilty by reason of insanity or guilty but mentally ill based on whether the jury believed that Petitioner knew right from wrong.

The State called Petitioner's brother, Jerome Wilson, as a witness at trial. (App. pp. 70-131). When asked if Petitioner was a problem when he was not sober or not on his medication, Jerome Wilson testified, "Big problem. One thing for sure, from working in mental health and dealing with a lot of different clients, he knows the difference between right and wrong." (App.

p. 115, lines 9-12). Trial counsel failed to object. Trial counsel was ineffective in failing to object.

In the order of dismissal the PCR judge wrote:

> This Court finds no merit in Applicant's allegation that Trial Counsel was ineffective for failing to object to the testimony of Applicant's brother, Jerome, as a lay witness giving expert opinion testimony on Applicant's mental state at the time of the crime. Trial Counsel credibly testified he saw no reason to object to Jerome's testimony because he did not believe he was holding himself out to be an expert on the subject of mental health, but he was only discussing Applicant's mental health history and his impressions of his brother's behavior at the time he witnessed him. This Court finds the choice not to object to the testimony was reasonable under the circumstances, as Jerome was not offering any opinions on Applicant's mental health in an expert manner. Jerome was simply explaining his interaction with his brother when he witnessed him immediately after the crime.

(App. p. 576). The PCR judge erred. The brother's testimony, "One thing for sure, from working in mental health and dealing with a lot of different clients, he knows the difference between right and wrong." (App. p. 115, lines 9-12), was first, non-responsive to the question asked. Second, the testimony went beyond the brother's impressions and interactions with the Petitioner. Instead, the brother's testimony constituted improper opinion testimony about Petitioner's mental state by a lay person who gave the jury the impression that he had expert training in mental health.

South Carolina permits lay witnesses to testify in the form of opinions, but only in very limited circumstances. In order for a lay witness to give an opinion, the testimony must (1) be rationally based on the perception of the witness, (2) be helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (3) not require special knowledge, skill, experience, or training. Rule 701, SCRE. While a witness may testify regarding his observations of a person, including observations that appear rational or irrational, the witness may not testify as to an opinion on the person's sanity or ability to conform his conduct to the

requirements of the law because such an opinion would require special knowledge, skill, experience, or training. The brother's testimony far exceeded the bounds for lay opinion. See State v. Westmoreland, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (Ct. App. 2017) ("We find the trial court abused its discretion by committing an error of law when it admitted Clevenger's testimony regarding the cause of Victim's death because it constituted improper opinion testimony from a lay witness.").

The PCR judge additionally found that trial counsel had a valid strategic reason for failing to object to the improper testimony writing, "Furthermore, Trial Counsel cannot [sic] deficient because he offered a valid strategic reason for choosing not to object to the testimony. He credibly testified that Jerome's [the brother's] testimony taken as a whole helped Applicant and his defenses, and Trial Counsel did not want to make Jerome look bad to the jury." (App. p. 576-577). The PCR judge again erred. Trial counsel could have elicited the beneficial parts of the brother's testimony while still objecting to the improper opinion testimony. Trial counsel's explanation does not constitute a valid trial strategy. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984).

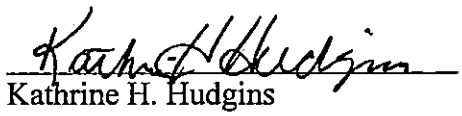
Finally, the PCR judge found that Petitioner failed to show prejudice because, "The evidence against Applicant was overwhelming, and there was not question that Applicant murdered his mother." (App. p. 577). While there may have been overwhelming evidence that Petitioner committed the act, there was conflicting, properly admitted expert testimony in regard to Petitioner's mental state. The sole issue to be determined by the jury was Petitioner's mental state. The improper opinion by the brother tipped the scales in favor of a finding of guilty but mentally ill rather than not guilty by reason of insanity.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the brother's improper opinion testimony about Petitioner's mental state. There is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different and the jury would have found Petitioner not guilty by reason of insanity. The conviction should be reversed based on prejudicial ineffective assistance of counsel.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Alexander B. Wilson, #175318, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 19th day of November, 2018.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 19th day of November, 2018.

(L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.