

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Dec 29 2020

S.C. SUPREME COURT

Certiorari to Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

TERVIN GOODMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001992

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

INDEX i

ARGUMENTS IN REPLY

I.

Petitioner’s argument that he did not voluntarily and intelligently waive his right to an appeal because counsel provided him with erroneous advice is preserved because it was properly raised to and ruled upon by the lower court.1

II.

Petitioner has shown both actual and presumed prejudice due to Counsel Murphy’s failure to adequately investigate and present mitigating evidence at Petitioner’s resentencing hearing.4

CONCLUSION.....6

ARGUMENTS IN REPLY

I.

Petitioner’s argument that he did not voluntarily and intelligently waive his right to an appeal because counsel provided him with erroneous advice is preserved because it was properly raised to and ruled upon by the lower court.

Respondent claims that Petitioner’s argument is not preserved for appellate review, presumably because Petitioner framed the issue simply as “my attorney told me we couldn’t appeal.” App. 114-121. Admittedly, Petitioner did not present the issue in concise legal terms, however he was not required to make such an explicit statement. As this Court has repeatedly held, “error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). “Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.” Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). Further, the PCR court issued a ruling on this issue, based solely on credibility findings, that Petitioner had not shown that he did not voluntarily and knowingly waive his right to appeal. The ruling by the PCR court is ripe for appellate review.

It is clear from the record that Petitioner properly raised the issue of Counsel Murphy’s failure to file an appeal. The testimony elicited at the PCR hearing revealed that Petitioner inquired about an appeal and that Counsel Murphy gave Petitioner erroneous advice, both as to Petitioner’s ability to appeal and as to the standard for appeal. To preserve the issue for appellate review Petitioner had to show that he did not knowingly and voluntarily waive his right to an appeal – he did so by showing the lower court that he requested an appeal and that Counsel Murphy misadvised him on his right to appeal and the process that had to be followed for an

appeal to be initiated. Thus, the issue of whether Petitioner knowingly and voluntarily waived his right to an appeal due to the fact that he was given erroneous legal advice was properly raised to the lower court and that court was given an opportunity to rule on the issue.

The state further argues that this Court should not look beyond the general credibility findings the PCR Court made regarding the testimony of Counsel Murphy and Petitioner in deciding whether Petitioner waived his right to an appeal. RPWC, 9. This argument ignores the well-established case law that, even considering credibility findings, there must be probative evidence that Petitioner knowingly waived his right to a direct appeal and that Counsel Murphy made certain Petitioner was fully aware of his right to appeal. See Simuel v. State, 390 S.C. 267, 701 S.E.2d 738 (2010).

The record in Petitioner's case is devoid of probative evidence that Petitioner waived his right to an appeal. Notably, Petitioner testified that he explicitly asked if they could appeal the resentencing and was told no by Counsel Murphy. App. 136, l. 22-App. 137, l. 3. In contrast, Counsel Murphy could only testify that he did not "think" Petitioner asked him about an appeal and further stated that he spoke to Petitioner about the appeal process "in general" during their first meeting. App. 144, l. 22-App. 145, l. 11.

It is also important to note that, despite Respondent's assertion to the contrary, Petitioner's argument is premised on an error of law. Black's Law Dictionary defines an error of law as a "mistake about the legal effect of a known fact or situation." *Mistake; also termed Error in Law; Error of Law*, Black's Law Dictionary (11th ed. 2019). Stated differently, an error of law occurs when there is a mistaken determination of the legal rules governing procedure or evidence. In Petitioner's case, Counsel Murphy attempted to justify his failure to file an appeal by stating that a meritorious ground had to exist to necessitate the filing of an appeal and that he

did not believe such grounds were present in Petitioner's case, therefore filing an appeal would be a "waste of time." App. 147, ll. 13-14. This was an erroneous determination of the legal rules governing the appeal procedure and as such was an error of law.

II.

Petitioner has shown both actual and presumed prejudice due to Counsel Murphy's failure to adequately investigate and present mitigating evidence at Petitioner's resentencing hearing.

Respondent asserts that because Petitioner did not present any additional mitigation evidence or witnesses during the PCR hearing that he cannot show prejudice. However, in Petitioner's case the record from the resentencing hearing revealed that there was extensive mitigation evidence that was not expounded upon. Further, Counsel Murphy's complete abdication of his duty to investigate and the minimal mitigation presented at the resentencing hearing denied Petitioner the assistance of counsel altogether.

As stated in Petitioner's initial petition, "*counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.*" Strickland v. Washington, 466 U.S. 668, 691, (1984) (emphasis added). This is not a duty that can be passed onto other individuals. Respondent contends that Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), somehow stands for the proposition that an attorney is not required to do any investigation so long as experts are hired. That is a skewed interpretation of the issues in that case. While Council did hold that an attorney should not, to use Respondent's language, employ a "do-it-yourself approach" to mitigation, Council did not relieve an attorney from his or her duty to perform reasonable, independent investigation.

At the PCR hearing Counsel Murphy testified that he met with Petitioner a total of three times. There is nothing in the record to suggest that Counsel Murphy conducted any other form of investigation. While Counsel Murphy did hire a testifying expert, the testimony that the expert provided at the resentencing hearing was generalized and vague. The expert conveyed to

the judge that Petitioner had a substance abuse problem, a conduct disorder, developmental and academic delays, and an unstable childhood home, yet none of this was expounded upon in any meaningful manner. Based on the minimal testimony provided by the expert during the resentencing hearing, it is apparent that Counsel Murphy was aware of potentially powerful mitigation, however he did nothing to confirm or deny whether such evidence existed. Much like the attorney in Council, had Counsel Murphy undertaken even minimal investigation it could have revealed powerful and detailed mitigation to support reducing Petitioner's sentence. Thus, Petitioner was actually prejudiced by Counsel Murphy's failure to investigate and present adequate mitigation because the resentencing judge was not provided with the specific mitigating circumstances needed to make a truly informed decision.

Additionally, Petitioner's case is one of the rare instances in which prejudice can be presumed. "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland v. Washington, 466 U.S. at 692 citing United States v. Cronin, 466 U.S., at 659, and n. 25. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Id. As argued in Petitioner's original petition, Counsel Murphy's complete failure to adequately investigate and present detailed, thoughtful mitigation during the resentencing hearing failed to provide an adversarial challenge to the state, constructively denying Petitioner the assistance of counsel altogether. Therefore, prejudice can, and should, be presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

CONCLUSION

For these additional reasons, this Court should grant the petition for writ of certiorari and order further briefing.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2020.