

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jan 14 2021

S.C. SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

RODERQUIZ R. COOK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000972

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR judge erred in finding that trial counsel was not ineffective for failing to preserve his objection to Petitioner’s co-defendant’s testimony that he was the shooter because that testimony was substantially different from the statement he originally gave to law enforcement and the state failed to disclose the co-defendant’s new statement until after pretrial motions in violation of *Brady v. Maryland* and *Riddle v. Ozmint*. 5

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ISSUE PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective for failing to preserve his objection to Petitioner's co-defendant's testimony that he was the shooter where that testimony was substantially different from the statement he originally gave to law enforcement and the state failed to disclose the co-defendant's new statement until after pretrial motions in violation of Brady v. Maryland and Riddle v. Ozmint?

STATEMENT OF THE CASE

Petitioner was indicted in June of 2011 by the Lexington County grand jury for attempted armed robbery. App. 1171. Petitioner was subsequently indicted in December 2012 by the Lexington County grand jury for conspiracy to commit armed robbery and murder. App. 1175 – 1180. On April 8, 2014, Petitioner was called to trial before the Honorable Lee S. Alford and a jury. App. 1. Petitioner was represented by Deon O’Neil. The state was represented by Nancy Cote and Heather Weiss. App. 1.

At trial, the state alleged that Petitioner conspired with three co-defendants to commit an armed robbery of the McDonald’s where Petitioner was a manager. The state further alleged that one of Petitioner’s co-defendants shot and killed the decedent during the robbery attempt. App. 190, l. 21 – 191, l. 25.

One of Petitioner’s co-defendants was his girlfriend, Tasha Matthews. Matthews testified against Petitioner and said that on the day of the incident, she drove Petitioner’s other two co-defendants, Meon Miller and Angelo Tucker, to the McDonald’s where Petitioner worked. App. 293, l. 1 – 296, l. 23. Matthews claimed she thought she was taking Miller and Tucker to “do a drug deal” until she realized that Tucker had a gun in his bookbag. App. 297, ll. 1 – 19. Matthews recalled that she dropped Miller and Tucker off at a stoplight near the McDonald’s and then went to wait at a nearby Waffle House. App. 299, l. 10 – 302, l. 16.

Matthews recalled that when she picked Miller and Tucker back up, they were arguing, and Miller was shaking. App. 306, l. 13 – 307, l. 24. Matthews saw Miller pull a gun out of his waistband and put it into her glove box. App. 308, ll. 2 – 7. Matthews was almost immediately stopped by a police officer who asked them what they were doing. Matthews lied to the police officer and stated she did not know Miller or Tucker and that she picked them up because they

said they needed a ride. App. 309, l. 1 – 311, l. 15. All three of them were transported to the Batesburg Police Department for questioning. App. 313, ll. 7 – 12.

Petitioner's co-defendant Miller also testified. Miller testified that he was Petitioner's cousin and that Petitioner called him on the morning of the incident to ask if he would help Petitioner in a robbery. App. 453, ll. 12 – 21; app. 456, l. 23 – 457, l. 16. According to Miller, Petitioner told him to get a gun and go to Petitioner's house, so Miller called Tucker because Tucker had a gun. App. 459, l. 11 – 463, l. 2. Miller maintained that Petitioner concocted the plan that Miller and Tucker would rob Petitioner at his job at the McDonald's. Miller said that Petitioner's idea was to have the person with the gun order the other McDonald's employees into the freezer and that they then would steal the money and split it. App. 467, l. 1 – 468, l. 4.

Miller claimed that Petitioner instructed him and Tucker to "wait by the garbage can" outside of the McDonald's and that Petitioner was going to send one of his employees out to take the trash out around 10 or 11 p.m. Miller further claimed that Petitioner told them to hold the employee at gun point and that the employee would lead them inside to the money. App. 468, l. 22 – 469, l. 5.

Miller maintained that Williams gave him and Tucker a ride to the McDonald's and they got out and went to the garbage can as instructed by Petitioner. App. 483, l. 22 – 485, l. 7. Miller said that Tucker pulled the gun on the employee who came out with the trash and the employee started wrestling with Tucker for the gun which caused it to fall on the ground. Miller said that he picked the gun up and when the employee started to rush towards him, he fired the gun. App. 488, ll. 7 – 489, l. 9. The McDonald's employee died from a gunshot wound to the abdomen. App. 660, l. 22 – 661, l. 2.

Petitioner was found guilty as charged. App. 1050, ll. 6 – 25. The trial judge sentenced him to thirty-years imprisonment for murder, twenty-years imprisonment for attempted armed robbery, and five-years imprisonment for conspiracy. All sentences were to run concurrently. App. 1064, l. 9 – 1065, l. 5.

On direct appeal, Petitioner was represented by Erica McElreath. Petitioner raised the following issue in his appeal:

Was the Defendant provided a fair trial when the prosecution withheld cell tower site records of the Defendant and co-conspirators until the day prior to the trial, withheld additional testimony of a co-conspirator explain her role in the alleged conspiracy until the closing of pre-trial motions, withheld a confession by a different co-conspirator that he was the triggerman in the alleged murder until the closing of pre-trial motions, and withheld additional cellphone address records of the Defendant and co-conspirators until the second day of trial?

The Court of Appeals affirmed Petitioner's convictions finding that the issue raised was not preserved by trial counsel. State v. Cook, 2015-UP-270 (S.C. Ct. App. filed on June 3, 2015).

Petitioner filed his PCR application on July 23, 2015 and the state filed its Return on May 23, 2016. App. 1067 – 1084. An evidentiary hearing was held on February 23, 2018, before the Honorable J. Derham Cole. App. 1085. Petitioner was represented by Kristy Goldberg and the state was represented by Susannah Cole. App. 1085. Petitioner, his trial counsel, and the prosecutor all testified at the hearing. App. 1086. The PCR judge denied Petitioner's application for relief. App. 1154 – 1170.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective for failing to preserve his objection to Petitioner's co-defendant's testimony that he was the shooter because that testimony was substantially different from the statement he originally gave to law enforcement and the state failed to disclose the co-defendant's new statement until after pretrial motions in violation of *Brady v. Maryland* and *Riddle v. Ozmint*.

Relevant Facts

Petitioner's trial counsel made a pretrial motion for the state to disclose any information covered by *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006), specifically requesting any new information that was different from Petitioner's co-defendant's statements that they had initially given to law enforcement. App. 64, l. 18 – 65, l. 17. The prosecutor claimed that she had already turned over everything and that there was no information that had not been disclosed to trial counsel. App. 65, l. 18 – 66, l. 3. Counsel again requested to know specifically if the state had spoken to any of the co-defendants since the last statements he received from them that contradicted anything they had previously said. App. 66, ll. 17 – 22. The prosecutor maintained that she was not aware of anything that was contradictory to what the co-defendants said in their previous statements. App. 66, l. 23 – 67, l. 4.

After a break, trial counsel told the trial judge that the prosecutor just disclosed that Petitioner's co-defendant Miller had admitted to the prosecutor that he was the shooter. The only statement that trial counsel had ever received from Miller was that he expressly denied being the shooter and instead pointed the finger at Tucker. App. 131, ll. 8 – 24. Counsel told the judge that he had prepared his entire defense based on Miller's denial of being the shooter and

therefore, counsel objected to Miller's new statement being introduced into evidence because it violated Rule 5, SCCrimP. App. 131, l. 25 – 132, l. 12.

The prosecutor responded that she always believed Miller was the shooter, and that under her theory of accomplice liability, who the shooter was did not matter. App. 133, ll. 15 – 25. The prosecutor also argued that the new information did not change anything for Petitioner's defense because Petitioner was alleged to have been the mastermind of the robbery and set the plan into motion. Therefore, the prosecutor argued, it did not matter who fired the fatal shot. App. 134, ll. 1 – 17.

Defense counsel responded that his trial strategy was that Miller was a liar because he denied being the shooter when all the evidence pointed to him being the shooter. App. 134, ll. 18 – 24. Counsel maintained that the new information made Miller a more credible witness which changed everything about counsel's defensive strategy. Furthermore, counsel was not even informed that Miller had been re-interviewed and the state disclosing this information only a few minutes before opening statements was trial by ambush. App. 134, l. 24 – 135, l. 23.

When asked by the judge, the prosecutor admitted that she had the new information for possibly a week and a half. App. 136, ll. 10 – 17. The trial judge agreed with defense counsel that the state should have disclosed the information sooner. App. 136, ll. 18 – 23. Trial counsel then pointed out that Miller was the sole witness who connected Petitioner to the robbery and murder by implicating Petitioner as the mastermind. Accordingly, Miller's credibility was an essential issue in Petitioner's defense. Counsel argued that the new information would do "tremendous damage" to Petitioner's case based on the way counsel had prepared. App. 137, ll. 3 – 16.

The trial judge stated that Miller's credibility was "still an issue" because he had now given an inconsistent statement, but because the new information was a "surprise," the judge continued the trial until the following morning. App. 138, l. 9 – 139, l. 24. The judge further cautioned the prosecutor that any new information that came to her attention needed to be disclosed to the defense. App. 149, ll. 6 – 22.

The following morning defense counsel requested copies of the notes made by the solicitor during her conversation with Miller when he changed his story to say that he was the shooter. App. 168, l. 17 – 169, l. 7. Counsel specifically stated that he was not requesting any work product information like the solicitor's impressions but rather the notes on what Miller said to her. App. 170, l. 11 – 171, l. 18. Ultimately, the judge denied counsel's request to see the prosecutor's notes from her interview with Miller. App. 173, l. 1 – 183, l. 11.

When the state called Miller to the stand, trial counsel did not renew his objection to the introduction of Miller's substantially different statement in which he admitted to the prosecutor that he was the shooter. App. 446, l. 9 – 452, l. 1. Miller then testified that during the attempted robbery of the decedent, he shot "at the ground" three times and thought he hit the decedent in the leg. App. 488, l. 23 – 496, l. 22. Trial counsel did not object to this testimony. Miller further testified that when he initially spoke with law enforcement he lied and said that Tucker was the shooter even though Miller later admitted to being the shooter. App. 522, l. 14 – 523, l. 4. Again, counsel did not object.

At Petitioner's PCR hearing, the prosecutor admitted that she failed to disclose Miller's new statement until after pretrial motions were finished and immediately prior to opening statements. App. 1117, l. 4 – 1119, l. 16. Trial counsel recalled asking for the new statement to be suppressed at Petitioner's trial because counsel believed that the state's entire case rested on

the credibility of Miller. App. 1132, l. 21 – 1133, l. 16. Miller initially denied being the shooter even in the face of overwhelming evidence that he was the shooter which counsel argued made him a less credible witness. Counsel’s trial strategy was to argue that if Miller was lying about being the shooter then he was also lying about Petitioner’s involvement as the alleged mastermind. App. 1133, l. 17 – 1134, l. 6.

Trial counsel recalled that the trial judge denied his motion to suppress Miller’s new statements but continued the case until the following morning. App. 1142, l. 24 – 1143, l. 4. Counsel maintained that the continuance to the following morning was insufficient to address his concerns about the new statement which was why he made an additional request the following morning to see the prosecutor’s notes from her meeting with Miller. App. 1143, ll. 5 – 25. However, counsel admitted that he did not renew his request to suppress Miller’s new statement nor did he object to Miller’s testimony to the new information during the state’s case-in-chief. Counsel admitted there was no strategic reason for his failure to renew his objections and that he should have renewed his objections. App. 1144, l. 1 – 1145, l. 15.

The PCR judge found that Petitioner failed to show “how he was prejudiced by counsel’s attempts to challenge the changing statement at trial or by counsel’s failure to properly preserve the issue for appeal.” App. 1165. Specifically, the PCR judge found that because there was evidence in the record to support the trial judge’s denial of defense counsel’s motion to suppress Miller’s new statement, the appellate court would have affirmed that ruling. App. 1165 – 1166.

Discussion

In order to prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984);

Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” “Evidence is material under Brady if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different.” State v. Proctor, 358 S.C. 417, 421, 595 S.E.2d 476, 478 (2004). Impeachment evidence can also be material. Id. The United States Supreme Court expounded upon the materiality requirement in Kyles v. Whitley, 514 U.S. 419, 434 (1995): “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”

Appellate courts must consider the context of the entire record in determining whether nondisclosed evidence was material, but the court should not consider the sufficiency of the

evidence. State v. Taylor, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998). Instead, “[t]he court’s function is to determine whether the appellant’s right to a fair trial has been impaired.” Id. “If a Brady violation is found to have occurred, PCR *must* be granted.” Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (emphasis added).

In this case, Petitioner’s right to a fair trial was impaired by the state’s last-second disclosure of significant impeachment evidence against the state’s most important witness and trial counsel failed to properly preserve that issue for appeal. The prosecutor admitted that she had the new statement from Miller in which he admitted to being the shooter for over a week before disclosing it to trial counsel. Even during pretrial motions, the prosecutor specifically denied having any contradictory statements from any of Petitioner’s codefendants. This was false. It was not until minutes before opening statements that the prosecutor disclosed the new information.

As trial counsel argued at that time, the new information did “tremendous damage” to Petitioner’s defense based on how counsel had prepared the case for trial. Counsel’s entire defense strategy was based on Miller denying that he was the shooter. Because Miller was the only state’s witness who implicated Petitioner in the crime, his credibility was the central issue in this case. Thus, the prosecutor’s failure to disclose this important information was a violation of both Brady v. Maryland and Riddle v. Ozmint.

In Riddle v. Ozmint, 369 S.C. 39, 42, 631 S.E.2d 70, 72 (2006), the defendant was found guilty of murder based primarily on the testimony of his co-defendant brother. Five days before the defendant’s trial in Riddle, the co-defendant gave a statement to police that was substantially different from his initial statement. This new statement was not disclosed to the defendant. Id. at 44, 631 S.E.2d at 73. Furthermore, during the co-defendant’s testimony, he denied having

even given the second undisclosed statement and the solicitor failed to correct this. Id. at 47, 631 S.E.2 at 75. This Court found that the undisclosed statement from the co-defendant was material under Brady because the inconsistent statement would have bolstered the defendant's claim that the co-defendant was unreliable. Id.

In this case, even though the trial judge continued the trial until the following morning, trial counsel maintained in his testimony at Petitioner's PCR hearing that this was insufficient to address his concerns. Counsel acknowledged that he still wanted Miller's new statement to be suppressed. However, counsel failed to renew his objection to the introduction of Miller's new statement at any other time during the trial, including in Miller's testimony. Counsel admitted that there was no strategic reason for this failure. The Court of Appeals then specifically found that this issue was not preserved by trial counsel for their review on Petitioner's direct appeal. State v. Cook, 2015-UP-270 (S.C. Ct. App. filed on June 3, 2015).

Trial counsel was ineffective in his failure to renew his objection because this prevented the Court of Appeals from addressing Petitioner's meritorious Brady and Riddle issue on his direct appeal. Had this issue been preserved, Petitioner may have prevailed on his direct appeal because the prosecutor's failure to disclose the new information effectively denied Petitioner a fair trial. Miller's new statement was material to Petitioner's case because, as trial counsel admitted, Petitioner's entire defense was based on Miller's credibility. Therefore, the verdict in Petitioner's case was not "worthy of confidence." Whitley, 514 U.S. at 434 (1995). The PCR judge erred in holding that trial counsel was not ineffective because counsel blatantly failed to preserve his objections to the introduction of Miller's new statement which should have been suppressed under Brady and Riddle. See Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006); Brady v. Maryland, 373 U.S. 83, 87 (1963).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

s/Adam Ruffin

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 2021.

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RODERQUIZ R. COOK,

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STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roderquiz Cook states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge J. Derham Cole, which was held on February 23, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Roderquiz Cook.

Respectfully Submitted,

s/Adam Ruffin

Adam Sinclair Ruffin

Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 2021.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/Adam Ruffin

Adam Sinclair Ruffin
Appellate Defender

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