

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jan 26 2021

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
William H. Seals, Jr., Circuit Court Judge

S.C. SUPREME COURT

Circuit Court Case No. 2017-CP-26-02564
Appellate Case No.: 2020-001265

Marcus Dwain Wright, 289646, Petitioner,
v.
State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

January 26, 2021.

PETITION

Questions Presented

1. Is the PCR court's decision contrary to the Fifth Amendment and in direct conflict with this Court's ruling in State v. Rivera, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013)?

Procedural History

The applicant, Marcus Dwain Wright, was convicted of murder, trafficking powder cocaine, possession with intent to distribute cocaine base, and possession of a weapon during a violent crime after a jury trial. The applicant was represented by L. Morgan Martin and Edward M. Brown. Wright was sentenced to life on the murder, five years on the weapons charge, twenty-five years on the trafficking charge, and fifteen years for the possession with intent to distribute cocaine base. All sentences were run concurrent to each other and consecutive to the life sentence. The applicant filed a direct appeal. The court of appeals affirmed in State v. Wright, 416 S.C. 353, 374, fn. 2 785 S.E.2d 479, 490, fn. 2 (Ct. App. 2016). The Petitioner then filed a post conviction relief action. A hearing was held, after which an order was entered denying Petitioner relief. Petitioner filed a motion to alter or amend judgment. The circuit court entered an order on the Petitioner's motion denying relief in part and granting relief in part. Based on that ruling the court then issued the AMENDED ORDER OF DISMISSAL from which this petition is taken.

Standard of Review

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (*citing* Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with

no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d [**840] at 527 (*citing* Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).” Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

I. THE DECISION OF THE PCR COURT IS CONTRARY TO THE FIFTH AMENDMENT AND IN DIRECT CONFLICT WITH THIS COURT’S DECISION IN STATE V. RIVERA, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013).

Prior to the defense putting up its case in the Petitioner’s trial the court advised the Petitioner of his Fifth Amendment rights. With the proviso that he was not bound by his decision the court inquired as to whether or not the Petitioner had decided to testify. The Petitioner responded that he would exercise his right to remain silent. The defense case proceeded and after failing to introduce the testimony of a single witness the defense rested without consulting with the Petitioner. After brief discussions about charges, and without any ruling, court concluded for the day. Prior to the trial resuming on the following morning the Petitioner advised trial counsel that he wanted to testify. Trial counsel informed the Petitioner that it was too late for him to testify and took no action to inform the court prior to the trial resuming. When trial resumed counsel still failed to inform the court that the Petitioner wanted to testify. Instead, counsel proceeded to continue the discussions about jury charges. This lead to a ruling denying the defense requests to charge manslaughter and self-defense. When the defense indicated that it was ready to proceed with closing arguments the Petitioner interrupted and asked to speak. Counsel then informed the court that Petitioner had changed his mind overnight and wanted to testify. The court denied the Petitioner the right to testify stating that counsel should have brought that to the court’s attention first thing in the morning prior to the court’s ruling on the requests to charge.

Despite the record being clear that counsel's misunderstanding of the law and failure to act timely led to a denial of the Petitioner's right to testify, the PCR court found no deficiency on the part of counsel. Despite having found no deficiency the PCR court went on to compound its error by conducting a harmless error analysis under Strickland v. Washington, 466 U.S. 668, 671, 104 S. Ct. 2052, 2056 (1984) rather than applying the analysis mandated by this Court in State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 706 (2013). The decision of the PCR court is therefore in direct conflict with the Fifth Amendment and this Court's opinion in Rivera.

Facts

After the State rested its case in the Petitioner's trial defense counsel made motions for directed verdicts on all charges. (A. p. 1044). The motions were denied and the court's ruling was followed by a discussion of the Petitioner's potential impeachment offenses. (A. p. 1046). The court then advised the Petitioner as to his basic rights, including his right to testify or remain silent. Immediately after advising the Petitioner of his rights the court inquired as to whether or not at that point the defendant thought he would testify: "And I ask you now -- *you're not bound at this point*, but have you determined whether you wish to testify or exercise your right to remain silent?" The Petitioner responded "Exercise my right to remain silent." (A. p. 1048, l. 10-12). The case proceeded with the defense calling Christopher McCray as a witness. McCray was presented *in camera* to first determine the admissibility of his testimony. (A. p. 1051). The court ruled McCray's testimony inadmissible and immediately after its ruling the court inquired whether the defense had any additional witnesses. Without conferring with the Petitioner defense counsel immediately responded: "We have no further witnesses." (A. p. 1067, l. 13-15). Then, still without a break, the jury was brought back in and the defense rested on the record. (A. pp. 1067-1068). The jury was then released for the day. (A. p. 1069). After the jury had been

released the prosecutor initiated a discussion about potential jury charges. (A. p. 1069). No rulings were made and court concluded for the day with the trial judge indicating that the discussions would continue the following morning. (A. p. 1078).

Prior to the trial resuming the following morning the Petitioner informed defense counsel Brown that he wanted to testify. Brown immediately informed his co-counsel Martin. (A. pp. 227-228; 1083-1084). Prior to the trial resuming neither Brown nor Martin immediately informed the court that the Petitioner wanted to testify. (A. pp. 1078-1079). When the trial did resume neither Brown nor Martin informed the court that the Petitioner had changed his mind and wanted to testify. (A. pp. 1078-1079). Instead, when the trial resumed and the case turned over to the defense, trial counsel engaged in lengthy discussions about requests to charge. (A. pp. 1078-1082). After those discussions the court entered a ruling denying the defense's requests to charge self-defense and manslaughter. (A. pp. 1082-1083). Still neither Brown nor Martin alerted the court that the Petitioner had informed them that he wanted to testify. When asked if the defense was ready to proceed with closing arguments Martin replied "Yes". (A. p. 1083, l. 14). At that point the Petitioner interrupted and asked permission to speak. (A. p. 1083, ll. 17-18). Martin, knowing what Wright wanted to say, finally informed that court that Wright wanted to testify:

Mr. Martin: "Judge, let me say for the record our client has come out this morning and tells me that he's changed his mind and he wants to testify. I have informed him that in my opinion that matter has passed us by as based on his assertion to the Court that he wished to remain silent. We have rested, but out of an abundance of precaution for the record, I don't want to cut him off, and I'll tell the Court that is what he wants to address with the Court." (A. pp. 1083, l. 12 - 1084, l. 4).

The trial court immediately responded: "No. The record is closed." (A. p. 1084, ll. 7-8).

A review of the record of the court's comments immediately following its ruling shows that the court initially based its ruling on the mistaken belief that the Petitioner had only decided to testify after hearing the court's ruling on the requests to charge: "Now that he has seen how the Court has ruled, he wants to adjust his strategy, I guess. I don't know what he wants to do, quite frankly, but it would appear that the desire now to testify is the result of rulings by the Court." (A. p. 1084, ll. 8-12). Martin reminded the court that when it asked Petitioner whether he would testify that it specifically told him that he was not bound by that decision. (A. p. 1084, ll. 16-18). The discussion then focused on the timing of the Petitioner's decision to testify:

The Court: Did he indicate to you, Mr. Brown, prior to coming in here that he wished to testify?

Mr. Brown: He indicated -- I went back to see him, and Mr. Wright did indicate that he wanted to testify, and ---.

The Court: All right. *And why wasn't that called to the Court's attention before the Court ruled?*

Mr. Brown: Well, Your Honor, no, that was this morning, not ---.

The Court: I know, but I just ruled on the two voluntary manslaughter and self-defense, just a few minutes ago, and he did not, when he came in here, neither he, nor you, nor Mr. Martin made any -- any -- any overture to the Court that he wanted to change his mind and testify. *That would have been the time, before the Court ruled.*

(A. p. 1086, l. 17 - p. 1087, l. 8).

Even after being informed that the Petitioner's decision to testify had been made prior to the trial resuming, the trial court restated its belief that the Petitioner had waited until the court had made a ruling on the charges before he decided to testify. (A. p. 1087). This time Martin spoke up and was unequivocal: "Well, Judge, let me say this. That is not how it happened." (A. p. 1087, ll. 16-17). Martin went on to explain exactly what happened and how he had informed

the Petitioner early that morning before the trial resumed that it was too late for him to testify.

Mr. Martin: For the clarity of the record, when he came out -- Mr. Brown came out, said he wants to testify. The when he came out, we sat here and talked and I told him that time had passed him by, that we had rested based on his assertion that he didn't want to testify, and I -- I didn't bring it up before we got into the motion, so for whatever difference that makes, he did not wait until you ruled to so say anything about that. He said that prior to that.

(A. p. 1087, ll. 17-24). Despite it being clear that the Petitioner had not waited until after the Court's ruling before deciding to testify, the trial court again denied the Petitioner the right to testify, now citing *counsel's failure* to inform the court prior to the court's ruling on the requested jury charges: "Well, it wasn't called to the Court's attention until that point [after the court's ruling on charges]. So I'm not going to allow him to testify. The record is closed." (A. p. 1087, l. 25 - p. 1088, l. 4).

Violation of Petitioner's Right to Testify in His Own Behalf

"[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 n.8. As such, the error is structural in that it is "so basic to a fair trial that [its] infraction can never be treated as harmless error." Fulminante, 499 U.S. at 289 (*quoting Chapman*, 386 U.S. at 23)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

In the Petitioner's case a timely motion to reopen the defense to allow the Petitioner to testify would have been granted. The court's comments make that clear. The only basis stated for denying the Petitioner's request to testify was that the court had already ruled on the jury charge requests. The court specifically cited counsel's failure to alert the court as soon as the case resumed that morning stating "that would have been the time, before the Court ruled." Martin

specifically stated to the trial court, not once but twice, that at the time the Petitioner informed them that he had changed his mind and wanted to testify Martin believed that it was too late and therefore took no action to inform the court. Counsel's inaction was clearly driven by a misunderstanding of the applicable law. Had counsel understood the applicable law they would have known that a motion to reopen would not only have been timely, but overwhelmingly supported by law if the motion had been made immediately upon the trial resumed that morning.

First, counsel failed to appreciate the fundamental nature of the right at issue. "A criminal defendant has a right to testify on his or her own behalf." Rock v. Arkansas, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is rooted in the Fourteenth Amendment due process right, the Sixth Amendment Compulsory Process Clause, and the Fifth Amendment's guarantee against compelled testimony. *Id.* at 51-53. This Court has recognized the importance of a defendant's testimony in his or her own case: "Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." State v. Rivera, 402 S.C. 225, 244, 741 S.E.2d 694, 704 (2013) *quoting* United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985).

Second, counsel should have considered whether the denial of the request would serve any purpose or its granting pose any prejudice to the State. "Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.*, at 295. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."

Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711 (1987). At the point that counsel was informed by the Petitioner that he wanted to testify counsel should have realized that denying the motion would serve no legitimate interests and allowing it would pose no prejudice to the State. Given the fundamental nature of the right to testify defense counsel should have known that a motion to reopen would have been granted if made immediately upon trial resuming that morning. Clearly counsel failed to conduct a proper analysis of the issue and as a result failed to immediately inform the court that the Petitioner wanted to testify. Instead counsel misinformed the Petitioner that it was too late to make the request because the defense had rested.¹ Counsel clearly did not understand the law applicable. “An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

Given that counsel’s decision not to timely move to reopen was based on an obvious misunderstanding of the law it can not in any way constitute a valid strategic decision. “No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. *See* Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (*Pleicones, J., dissenting*) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved").” Abney v. State, 408 S.C. 41, 55-56, 757 S.E.2d 544, 551-52 (Ct. App. 2014) *Justice Few*

¹To the extent that Martin’s PCR testimony may imply, contrary to his representations to the trial judge, that his inaction was based on Wright’s having “reconciled himself” that testifying was not in his best interests, any alleged decision by the Petitioner, or impression that the Petitioner may have given Martin at that point, would have been tainted by Martin’s incorrect advice that it was already “too late” for Wright to testify.

dissenting.

In Rivera this Court emphasized the importance of a defendant's right to testify in his own behalf:

The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("[F]undamental to a personal defense . . . is an accused's right to present his own version of the events in his own words." (emphasis added)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53 (quoting Harris v. New York, 401 U.S. 222, 230, 91 S. Ct. 643, 28 [*242] L. Ed. 2d 1 (1971)). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Id.* at 51. "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* (quoting Faretta v. California, 422 U.S. 806, 819 n.15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id.* at 52 (citing Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* "The choice of whether to testify in one's own defense . . . is an exercise of [that] constitutional privilege." *Id.* at 53 (quoting Harris, 401 U.S. at 230) (omission in original). "A person's right . . . to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence;" Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (quoting In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (emphasis omitted)).

State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013).

In Rivera the trial judge relied on Rule 403, SCRE in excluding Rivera's testimony.

Although it is unclear what particular rule was relied on by the trial court in the Petitioner's case, the analysis should be the same. "Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote" *Id.*" State v. Rivera, 402 S.C. 225, 245, 741 S.E.2d 694, 704-05 (2013) (quoting Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (2006)). Although Rivera did not specifically involve a motion to reopen the case to allow the defendant to testify,

this Court in Rivera cited United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) in support of its analysis. Walker dealt directly with the denial of a motion to reopen to allow a defendant to testify and reversed based on the same analysis applied by this Court in Rivera. As in the Petitioner's case the motion to reopen in Walker was made after the defense rested but before closing arguments or jury instructions. In its analysis the court in Walker noted that reopening the case for Walker to testify posed no prejudice to the prosecution's case:

“The . . . testimony [sought to be admitted through the motion to reopen] would not have carried a distorted importance merely by being introduced after a reopening. First of all, since neither closing arguments nor jury instructions had yet been delivered, the . . . testimony would have been heard in the orderly flow, with perhaps an intervening continuance, of the defense testimony. But even assuming that the testimony might have derived undue emphasis from its appearance subsequent to all parties resting, a cautionary instruction by the trial judge might have remedied that potential problem. 596 F.2d at 779.”

United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985).

Applying Walker in the Petitioner's case shows that a motion prior to the court's ruling on jury charges would not have distorted the importance of the Petitioner's testimony. The Petitioner's testimony would have been heard by the jury in the orderly flow and the court could have given an instruction for the jury not to put any importance on the fact that the defense reopened its case to offer the Petitioner's testimony. Counsel should have been aware that an immediate motion to reopen would have met every criteria to be granted. Counsel clearly did not and as a result misinformed the Petitioner that it was too late for him to testify. But for the failure of counsel to understand the applicable law and timely raise the issue the Petitioner would have been allowed the opportunity to testify. The failure to protect the Petitioner's right to testify clearly constitutes an error on the part of counsel. The PCR court therefore erred in finding no deficiency in counsel's performance.

Erroneous Application of Harmless Error Review

Despite having found no deficiency on the part of trial counsel the PCR court went on to conduct a prejudice analysis, and contrary to this Court’s decision in Rivera applied a harmless-error analysis to the denial of the Petitioner’s right to testify on his own behalf. “As to prejudice, first, the Court finds that even if Counsels had immediately confronted the trial court with Applicant’s new found desire to testify, *there is not a reasonable probability the outcome would have been different.*” (A. p. 27). The PCR court’s application of a harmless error analysis is in direct conflict with this Court’s holding in Rivera and therefore constitutes an error of law. In Rivera this Court explicitly held that the improper refusal to permit a defendant to testify in his own defense is a structural error that requires reversal without a particularized prejudice inquiry. “The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis. We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry”) (*citations omitted*).” State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

Here the PCR court clearly applied a harmless-error analysis to the denial of Applicant’s right to testify in his own behalf and based on its own determination of the Applicant’s credibility found that the outcome of the trial would not have changed even had the Applicant been allowed to testify. The PCR court’s ruling is therefore in direct conflict with this court’s opinion in Rivera:

“In sum, we are persuaded that the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 *n.8*. As such, the error is structural in that it is "so basic to a fair trial that [its] infraction can never be treated as harmless

error." Fulminante, 499 U.S. at 289 (*quoting Chapman*, 386 U.S. at 23)."

State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

The PCR court's application of a harmless error analysis in Petitioner's case constituted an error of law and is in direct conflict with Rivera. This Court's holding in Rivera requires that the Petitioner's conviction be reversed and a new trial granted.

Conclusion

Based on the foregoing this Court should reverse the decision of the PCR court and remand the case for a new trial.

Respectfully submitted,

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