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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Diane Shafer Goodstein, Circuit Court Judge

WILLIE THOMAS STARNES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000144

PETITIONER'S REPLY TO JOHNSON PETITION

Willie Thomas Starnes
Perry Corr. Inst.
430 Oaklawn Road
Pelzer, SC 29669

IN HIS OWN BEHALF

ISSUES PRESENTED

1. Whether the lower court erred when it found no violation for Petitioner's Counsel to not inform Petitioner's wife of her right to assert spousal privilege?

2. Whether the lower court erred when it failed to find it reversible error for the Solicitor to inform the jury that the empty chair at the prosecution table was for the deceased?

3. Whether the lower court erred when it failed to rule it a violation of Petitioner's rights for trial counsel to fail to share and disclose to Petitioner new witness statements from William Pate and Martha Pate received immediately prior to trial?

4. Whether the lower court erred by not ruling it was not error for trial counsel to not request a mistrial or request to be removed a sleeping juror with an alternate juror when juror was caught sleeping during trial?

5. Whether the lower court erred by ruling trial counsel properly prepared Petitioner by effectively communicating and explaining the trial and testifying?

6. Whether the lower court erred by ruling counsel effectively assisted Petitioner in plea negotiations?

THE FACTS -- SUMMARY OF PCR HEARING

Petitioner is serving a sentence of Life Without the Possibility of Parole (LWOP) for murder and armed robbery. Petitioner was arrested on August 26, 2013, and remained in the county jail until his trial on August 25, 2014. Petitioner stated he was represented by counsel. When counsel read the "Motion of Discovery" to him there were some items still missing at that time. Counsel refused to give him a copy of the discovery documents, saying it would not be safe, but he read the materials to him. Specifically, Petitioner testified the SLED report analyzing the paint found on the truck was missing, and the paint from the moped on the truck was the only physical evidence linking him to the crime. Petitioner did, finally, receive this report, but it was so close to trial that it did not help in decisionmaking.

Petitioner testified during the hearing the the victim was found on the side of the road by some of the victim's relatives -- Martha and William Pate. Petitioner testified he was concerned about their statements because, in his opinion, their trial testimony differed from the written statements to say the murder was premeditated. He found out about the statements being changed only two days before trial. Petitioner stated the Pates claimed at trial the victim said Petitioner got out of the car and hit him and then ran over him a second time. Petitioner testified counsel never mentioned the new statements to him or shared them. Petitioner alleges this was harmful to his case, and the Pate's testimony the victim was in pain and screaming, "Oh, God, help me" changed the outcome of his case. He should have received those statements.

Regarding plea negotiations, Petitioner testified counsel never conveyed an offer to him, but the solicitor personally offered thirty years, served day for day, and said Petitioner would receive Life Without the Possibility of Parole (LWOP) at trial. According to Petitioner, this exchange took place outside counsel's presence, and Petitioner never discussed the offer with Counsel. Petitioner also stated Counsel mentioned a fourteen-year sentence during trial, but the Counsel indicated the State would not agree. Petitioner testified he did not understand he was facing LWOP because he cannot read. Applicant first testified he was not served with LWOP notice.

Petitioner further testified his wife testified at trial, and he asked counsel to object to her testimony. According to Petitioner, Counsel said the jurors needed to hear her testimony because it would help to show remorse. Petitioner testified his wife said he got on his knees and claimed to have hit someone on a moped. However, Petitioner testified he wanted counsel to object to the testimony on grounds of marital privilege.

Petitioner also testified he wanted Counsel to move for a mistrial or request the removal of a juror for sleeping during trial. Petitioner testified he did not see the sleeping juror himself. Regarding Petitioner's right to testify at trial, Petitioner explained Counsel said it would not have been in his best interest to do so because his statement to law enforcement was all the jury needed to hear, and the state would introduce his prior record if he testified. Finally, Petitioner testified he believed Counsel would have been

granted a continuance had he asked for one.

Petitioner's wife, Patricia Starnes (Patricia) also testified. Patricia explained she was still legally married to Petitioner, but they had no ongoing relationship and had not spoken in over three years. Patricia testified she was interviewed by law enforcement and gave a statement concerning some conversations she had with Petitioner. She first testified she was not aware she could have asserted spousal privilege, and if she had been aware, she would have done so because she did not want to testify.

Counsel testified he was the only attorney ever appointed to represent Petitioner in this case. Counsel recalled the appointment because the Solicitor informed him of it and gave him an overview of the facts. Counsel testified he went to meet with Applicant within two days after Petitioner's arrest. Counsel further testified he received the first batch of discovery in November, 2013 and continued to receive additional discovery up until trial, and that evidence was not an issue at trial.

Regarding the second statements of William and Martha Pate, Counsel testified he received them prior to trial, but he could not recall exactly when. On cross-examination, Counsel noted the statements were dated August 12, 2014, and the trial began on August 24, 2014. Counsel also testified he did not remember specifically reviewing the statements with Petitioner, but he met with Petitioner a week before trial and went over all discovery they had. Counsel explained Highway Patrol took the first set of statements and the difference

between those and the second set was the part where Petitioner turned around and struck the victim with the car the second time. Counsel testified that information was damaging to the defense of accident. However, Counsel conceded that if Applicant admitted to the second strike in his own statement to law enforcement, then the Pate's second statement did not contain new information. Counsel agreed he never spoke to Patricia because she and Petitioner did not seem to have a good relationship leading up to trial. Counsel explained he had a copy of her statement so he knew what she was going to say. Counsel characterized Patricia's testimony as "damaging"; however, he felt it inappropriate to discuss with her spousal privilege due to a possible appearance of witness tampering. Counsel stated it did not sit right with him as he was testifying. Counsel agreed he could have asked the Court to inform Patricia of the law regarding spousal privilege, and he did not know why he did not ask.

Regarding the sleeping juror, Counsel explained he brought the Court's attention to a juror whose eyes were closed, and Counsel was not sure if she was sleeping or if something else was going on. Counsel testified he did not recall why he did not request the judge to remove the juror except that he felt it was clear the judge was not going to do it.

ARGUMENT AND AUTHORITY

1. The lower court erred when it found no violation for Petitioner's counsel to not inform Petitioner's wife of her right to assert spousal privilege.

Petitioner alleges counsel was constitutionally ineffective because he did not speak to Petitioner's wife before trial and inform her of her right to assert spousal privilege, not did he object when the trial court failed to advise her of same.

"The spousal privilege provides that in criminal cases married persons cannot be compelled to testify against their spouses concerning any communication made between them during their marriage." State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996); see also, S.C. Code Ann. §19-11-30 ("[N]o husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication mad by one to the other during their marriage."). The right to exercise the privilege against disclosing marital communications is solely the witness spouse from whom the privileged information is being sought. State v. Motes, 264 S.C. 317 (1975). Here, Patricia testified she would have asserted her spousal privilege had she known of her right to do so. She could not have waived this right, as the lower court concluded; because, waiver is an "intentional relinquishment of a known right". Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981); cited in, Sanders v. State, 281 S.C. 53, 314 S.E.2d 319 (1989).

It was reversible error for no one to have advised Petitioner's wife of her right to not testify, and this responsibility rests upon the shoulders of trial counsel.

2. The lower court erred when it failed to find it reversible error for the Solicitor to inform the jury that the empty chair at the prosecution table was for the deceased.

Applicant alleged Counsel should have objected during the State's opening argument when the solicitor informed the jury the empty chair at the prosecution table was for the deceased victim. At the evidentiary hearing counsel agreed the statement may have been objectionable. However, he stated the line about the chair may not have seemed like a big deal to him at the time.

The lower court found that trial counsel was not deficient by not objecting to the statement about the chair. The lower court ignored the inflammatory nature of the remark.

"The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented." State v. Kornahrens, 290 S.C. 281 (1986) (internal citations omitted). The solicitor's remarks regarding the chair served none of this purpose. It was not a fact which was to be proven or an explanation of the case. It served no legitimate purpose, but only served to inflame the passions of the jury. "As long as the State introduces evidence to reasonably support the stated facts, there is no error." Id. The chair was not evidence. The chair was not a relevant fact. The chair only promoted emotional prejudice and was impermissible. It damaged Petitioner's opportunity for a fair trial.

3. The lower court erred when it failed to rule it a violation of Petitioner's rights for trial counsel to fail to share and disclose to Petitioner new witness statements from William Pate and Martha Pate received immediately prior to trial.

Petitioner alleges Counsel was ineffective for failing to inform him of new witness statements from the victim's family members, William and Martha Pate, received "immediately" prior to trial. Petitioner alleges this failure prejudiced him because the statements contain a new contention that Petitioner deliberately struck the victim with his vehicle a second time.

Counsel testified the statements were dated August 12, 2014, and the trial began on August 25, 2014. Counsel also testified he did not remember specifically reviewing the statements with Applicant, but he met with Applicant a week before trial and went over all the discovery they had at that time. Counsel testified he received the statements before trial, but he could not recall exactly when. The petitioner testified that counsel never mentioned the new statements to him or shared them. Petitioner believes he should have received these statements prior to trial, which could have made a difference in his decision to plead guilty.

It is of no consequence that he had admitted to striking the victim a second time. Efforts to suppress such statement could have been made, but with the new statements having been provided, it was a futile effort to have counsel suppress the petitioner's statements. Petitioner is informed and believes, and based upon such information

alleges that he has shown prejudice sufficient to demonstrate Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009). It is error for the lower court to be not finding either deficiency or prejudice and declining to grant relief on this allegation.

4. The lower court erred by ruling it was not error for trial counsel to not request a mistrial or request to remove a sleeping juror with an alternate juror when juror was caught sleeping during trial.

Petitioner alleges Counsel was ineffective for failing to move for a mistrial or removal of a juror who was caught sleeping during trial. It was error for the lower court to disagree.

During trial, Counsel raised the issue of a potentially sleeping juror. Tr. p. 587. The juror informed the court she did not feel well and asked for a break, which the trial court immediately gave. Tr. pp. 586-87. The trial court then stated, "[A]fter you brought it to my attention, I watched her. I don't think she was sleeping She had her eyes closed when he was testifying, and then she would open them up." Tr. p. 588. After the break, the trial court instructed the juror had told a bailiff she was fine, and the trial court instructed her to let the bailiffs know if she started feeling bad again. Tr. pp. 590-591.

Immediately after the State rested, Counsel raised the issue again, alerting the trial court the juror may have been sleeping again. Tr. pp. 638-639. The trial court responded it had been

watching the juror, and although she would close her eyes at times, she would always open them and make eye contact. Tr. p. 639. The trial court stated, "I kept looking because I got the note ...Every time I would look...if her eyes were closed, she would open them back up within a matter of seconds and she was making direct eye contact with me." Tr. p. 640.

Counsel testified he did not recall why he did not ask the judge to remove the juror. He recalled there was some discussion about using an alternate juror.

It is obvious that, sleeping or not, the juror was not able to perform at a level demanded of a rational, informed trier of fact. Counsel did have a basis to make either a motion for a mistrial or a motion to have the juror removed. It is necessary to remove jurors who are not competent to perform their prescribed duties. State v. Hurd, 325 S.C. 384 (1996).

The lower court committed reversible error by not granting relief upon this ground.

5. The lower court erred by ruling trial counsel properly prepared Petitioner by effectively communicating and explaining the trial and testifying.

Petitioner alleges Counsel was constitutionally ineffective because he did not properly communicate with Applicant during the course of the representation and did not prepare Applicant for trial. Petitioner wanted to testify at his trial, but counsel pressured him to accept the idea that it would not have been in his best interests to testify. He could have challenged parts of the statements and explained things in a better light. Petitioner does

not believe his past record would have made as much difference in effecting his testimony as counsel made it seem at the time. The lower court rules that Counsel and Petitioner discussed the issue on multiple occasions; however, it is the nature of the conversations, not the frequency or even duration. The allegation is that counsel did not properly communicate, and the lower court does not address this issue. See, Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) and Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997).

6. The lower court erred by ruling counsel effectively assisted Petitioner in plea negotiations.

Petitioner contends Counsel was constitutionally ineffective in plea negotiations on Petitioner's behalf.

Counsel never conveyed any plea offer to him. He never fully understood he was facing LWOP -- he cannot read. Due to his lack of education and reasoning ability, he was confused throughout the entire process. He had counsel, but a solicitor speaking to him without benefit of counsel, offering a plea negotiation. He was offered by his counsel a plea for fourteen years, but that was never real because the solicitor would not go for it. He never understood the implications of turning down the State's offer.

"[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); see also , Davie v. State, 381 S.C. 601, 609, 675 S.E.2d

416, 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance").

Petitioner has demonstrated a reasonable probability that: (1) he would have accepted the earlier plea offer had he been afforded effective assistance of counsel, (2) the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it, and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances) that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

It is undisputed that when Petitioner knew of the thirty-year offer it was rejected without advice of counsel. Petitioner has proven he would have accepted the earlier plea if he had been afforded effective assistance of counsel; therefore, this allegation has merit and it was error for the lower court to rule differently.

VERIFICATION

I, Willie Thomas Starnes, first being duly sworn, hereby deposes and says that I have read to me the foregoing twelve pages and the contents thereof are true and correct to the best of my knowledge and understanding, excepting as to matters stated upon information and belief, and as to those I believe them to be true also.

W Starnes
Willie Thomas Starnes, Pro Se

Respectfully submitted:

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Dated: 3-9-21