

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
Certiorari to Lexington County
Honorable J. Derham Cole, Circuit Court

Roderquiz R. Cook,

Petitioner

v.

State of South Carolina,

Respondent

APPELLATE CASE NO. 2020-000972
PETITION FOR WRIT OF CERTIORARI

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MAR 15 2021
S.C. SUPREME COURT

RECEIVED
Mar 17 2021
SC Court of Appeals

ISSUE PRESENTED

Did the PCR judge err in not finding that counsel was ineffective for failing to preserve his objection to Petitioner's co-defendant's new statement and testimony, where in his statements prior were substantially different from the statement introduced by the prosecution after pre-trial motion minutes before opening statement in direct violation of Brady v. Maryland and Riddle v. Ozmint?

STATEMENT OF 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, 2013, Petitioner was called to trial before the Honorable Lee S. Alford and a jury. App. 1. Petitioner was ineffectively represented by Deon O'Neil. The state was represented by Nancy Cote and Heather Weiss.

At trial, that Petitioner conspired with three co-defendants to commit an armed robbery. The state further alleged that one of petitioner's codefendant shot a cause the death of the decedent during the attempted robbery. App. 190, 1. 21-191, 1. 25.

One of petitioner co-defendant was his daughter's mother, Tasha Matthews. Matthews testified for the state saying "she drove Petitioner's co-defendants Meon Miller and Angelo Tucker to do a drug deal" she did not realize Tucker had a gun in his bookbag. App. 293, 1. 1-297, ll. 1-23.

Matthews recalled the when she picked Miller and Tucker up they were arguing. Matthews witness Miller pulled a gun from his waistband and place it in the glove box. App. 308, ll. 2-7

Petitioner's co-defendant Miller also testified that he was the petitioner's cousin and that Petitioner called him that morning of the incident to ask if he would help him with a robbery. App. 435, 1. ll-463, 1. 2. Miller called Tucker because he needed a gun. Miller maintained that Petitioner help plan the Robbery of his job. Miller said the idea was for the petitioner to send one of his employees out to take the trash and Miller would hold the employee at gun point and lead that employee inside to retrieve the money. App. 468, 1. 22-469, 1.5.

Miller maintained that Matthews gave him and Tucker a ride to the area and they got out and went to the garbage can as instructed. App. 483, 1. 22-485, 1. 7. Miller said that Tucker pulled the gun on the employee who came out and 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 rushed at him, he fired the gun. App. 488, ll. 7-489, 1. 9. The McDonald's employee died from a gunshot wound to the abdomen. App. 660, 1. 22-661,, 1. 2.

Petitioner was found guilty as charged. App. 1050, ll. 6-25. The trial judge sentenced him thirty-years imprisonment for murder, twenty-years imprisonment for attempted armed robbery, and five-years imprisonment for conspiracy. All sentence to run concurrently. App 1064, 1. 9-1065, 1. 5.

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

The defendant was not provided a fair and just trial when prosecution withheld cell tower site records of defendant and co-defendant until the day of trial. Prosecution also withheld additional testimony of her role in the alleged conspiracy until the closing of pre-trial motion. Prosecution deliberately withheld the confession by a different co-defendant (who was the states star witness), that he was the gunman in the alleged conspiracy until minutes before opening statements, and prosecution withheld addition cell phone address records of defendant and co-defendants until the second day of trial.

The Court of Appeals affirmed Petitioner's conviction finding that the issue raised was not preserved by trial counsel. State v. Cook, 2015-UP_270 (S.C. CT. App. Filed on June3, 2015).

Petitioner filed his PCR application on July 23, 2015 and the state filed its return on May 23, 2016. App. 1076-1084. An evidentiary hearing was held in 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 counsel and the prosecutor all testified at the hearing . App. 1086. The PCR judge denied Petitioner's application for relief. App. 1154-1170.

The petition for wit of certiorari follows.

ARUGMENT

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

Petitioner's trail 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 codefendant statement that he had initially given to law enforcement. App 64, 1. 18-65, 1. 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, 1. 18-66 1. 3. Counsel again requested to know specifically if the state had spoken to any of the co-defendants since that 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-defendant said in his previous statement. App. 66, 1. 23-67, 1-4.

After a break trail counsel told the 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 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, 1. 25-132, 1. 12.

Riddle v. Ozmint in the holding The Supreme Court held that (1) solicitor's failure to disclose impeachment evidence constituted Brady violation and (2) the state was obligated to correct co-defendants false testimony of trial.

Brady violation must demonstrate that evidence (1) favorable to the accused; (2) in the possession of known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused guilt or innocence or was impeaching. Inconsistent statement would have bolstered defendant was unreliable witness why had to murder, and prosecution's case rested largely on the co-defendant's recounting of the crime. The burden is on solicitor to disclose material evidence which is exculpatory or impeaching. Evidence is material under Brady if there is a reasonable probability that that result of the preceding would have been different had the information been disclosed.

The prosecutor responded that she always believed Miller was the shooter, and that under her *theory* (not law) 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 her theory because the petitioner was the alleged instigator of the robbery and set the alleged plan in 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 vehemently denied being the shooter in two separate statements prior to the ambush of his third statement that was allowed in before opening statements. App. 134, ll. 18-24. Because of this new information trial counsel's stated he didn't had a strategy for new statement which made him ineffective. App. 131, 1. 25-132, 1. 12. Furthermore, counsel was not even informed the Miller had been re-interviewed 8 days and the state disclosing this information approximately 8 minutes before opening statements is by definition trial by ambush. App. 134, 1. 24-135, 1. 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 state should have disclosed the information sooner. App. 136, ll. 18-23. Trial counsel then pointed out that Miller was the sole witness who implicated Petitioner to the robbery and the murder by implicating Petitioner as the instigator. 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.

A prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of Justice. Not only is it unrealistic to require petitioner and his attorney to re-interview all officers and co-defendants in the days before trial, but that is not what Brady requires. Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. Eg; state v. Proctor, 358 S.C 424, 595 S.E. 2d 480 (2009). The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed but whether, without this impeachment evidence he received a fair trial "resulting in a verdict worthy of confidence. Kyles v. Whitley, supra, at 434, 115 soct our Judicial System relies upon the integrity of the participants. State v. Quattlebaum, 338 SC 441, 527 S.E. 2d 105 (2000). In this case, a prudent solicitor would have chosen to disclose the January 22 questioning and the resulting statement.

The trial judge stated that Miller's credibility was "still an issue" because he had now given an inconsistent statements, but because the new information was a "surprise", the judge continued the trial until the following morning. App. 138, 1. 9-139, 1 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 for the third time to say that he was the shooter. App. 168, 1. 17-169, 1. 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, 1. 11-171, 1. 18. Ultimately, the judge denied counsel's request to see the prosecutor's notes from her interview with Miller. App. 173, 1. 1-183, 1. 11.

When that 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 he was the shooter. App. 446, 1. 9-452, 1.1. 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, 1. 23-496, 1. 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 be the shooter. App. 522, 1. 14-523, 1. 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, 1. 4-1119, 1. 16. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost (SUV Filian 335 F.3d 119 92nd 2203). 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, 1. 21-1133, 1. 16. Miller initially denied being the shooter even in the face of witness. Counsel's trial strategy was to argue that if Miller as lying about being the shooter then he was also lying about the Petitioner's alleged involvement.

Trial counsel recalled that the trial judge his motion to suppress Miller's new statement but continued the case until the following morning. App. 1142, 1. 24-1143, 1. 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 a redacted copy of prosecutor's notes from her meeting with Miller. App. 1143, 1. 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 his ineffectiveness when stating there was no strategic reason in his failure to renew his objections and that he should have renewed his objections.*** App.1144, 1.1-1145, 1. 15.

A fundamental miscarriage of justice has occurred Murray v. Carrier. 477 U.S. 478. 106. S.ct. 2639. 91 L.Ed 2d 397 (1986). The result of the proceeding was fundamental unfair and unreliable. The prosecutors protracted course of conduct caused extra ordinary prejudice and exhibited disregard of the prosecutors duties. Serious errors in their handling of petitioners case failed to meet constitutional duties of Brady v. Maryland and the prosecutors office.

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 trial cannot be relied on as having produced a just result” Strickland v. Washington, 466 US 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, 466U.S. at 687-688.

Courts use 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 negligent error, 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 668. “ A reasonable probability is a probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325S.C. 182, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.U. at 668.

In Brady v. Maryland, 373 U.S. 83, 87 (1963) the United States Supreme Court held that “the suppression by the prosecutor 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 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 non-disclosed 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, “the court’s function is to determine whether the appellant’s right to a fair trial has been impaired.” Id. “if 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 statement from any of Petitioner’s co-defendants. This was

false. Why? Because she ambushed the trial counsel before opening statements with her sudden presentation of Miller's new statement.

As trial counsel argued at the 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 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.2d 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.

Trial counsel was ineffective in his negligent 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 issue been preserved, Petitioner may have prevailed in his direct appeal because the prosecutor's deliberate failure to disclose the new information effectively denied Petitioner a fair and just trial. Miller's new statement was material to Petitioner's case because, as trial counsel admitted, his entire defense was based on Miller's credibility. Therefore, the verdict in Petitioner's case 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 to grant petition for writ of certiorari, and Petitioner objects to counsel being relieved from case and brief issues fully and presented.

Proctor Cook 3-4-2021