

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2017-002494

RECEIVED

Mar 17 2021

SC Court of Appeals

Jaquwn Brewer #347482, ... Petitioner

vs.

State of South Carolina, ... Respondent.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Did the post-conviction relief court err in not granting relief for appellate counsel's failure to raise other, more viable issues including, but not limited to, burden shifting and failure to maintain integrity of structural due process?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. Petitioner was indicted during the June 2009 term of the Beaufort County Grand Jury for one count of assault and battery with intent to kill, one count of possession of a weapon during the commission of a violent crime, and one count of murder. (2009-GS-07-1279, -1296, -1293). Petitioner proceeded to trial before the Honorable William H. Seals, Jr. and a jury on August 26, 2011. Petitioner was represented at trial by Jared S. Newman, Esquire and was found guilty as indicted. He received sentences of twenty years for assault and battery with intent to kill, five years for possession of a weapon during the commission of a violent crime, and life without parole for murder. The sentences were to run concurrently.

A timely notice of appeal was filed on Petitioner's behalf and timely perfected by James A. Brown, Jr., a solo practitioner in Beaufort, South Carolina.¹ The South Carolina Court of Appeals sent a certified question to the South Carolina Supreme Court. The South Carolina Supreme Court affirmed in part, reversed in part, and remanded. State v. Brewer, 411 S.C. 401, 768, S.E.2d 656 (2015). Remittitur issued on March 5, 2015.

An evidentiary hearing on Petitioner's post-conviction relief application was convened on February 13, 2017 at the Beaufort County Courthouse before the Honorable R. Scott Sprouse. Petitioner was represented by James K. Falk, Esquire, with Ruston W. Neely, Esquire representing Respondent. An order of dismissal was signed by Judge Sprouse on October 30, 2018. A timely notice of appeal was filed. After initial filings in this matter, the Supreme Court transferred this

¹ Petitioner's petition for writ of certiorari stated the direct appeal was pursuant to Anders v. California, 378 U.S. 738, 87 S.Ct. 1398 (1967). This was an error but had no bearing on the remainder of the petition.

case to the Court of Appeals on April 19, 2019. On February 18, 2021, the Court of Appeals issued an order granting a writ of certiorari on Question III regarding ineffective assistance of appellate counsel. This initial brief of Petitioner follows.

STATEMENT OF FACTS

The underlying incident in this case was a shooting at a birthday party held at the Semper Fi Club in Beaufort County on May 23, 2009. App. p.122, line 7 – p.123, line 5; p.203, line 21 – p.204, line 12. This party followed a family reunion. During the party, a gentleman named Donald Parker was shot (App. p.263, line 10 – p.265, line 18) and a gentleman named Henry Jones died from gunshot wounds. App. p.126, line 17 – p.127, line 1; p. 270, lines 14-15; p. 273, line 22 – p. 275, line 25. It is undisputed, both through photographic and testimonial evidence, that Petitioner possessed a gun and fired shots at the club that evening. App. p.39, lines 3-6; p. 172, line 4 – 14; p.457, line 3 – p.459, line 16.

The morning after the shooting, Petitioner became the focus of law enforcement's investigation and voluntarily came to the police station. App. p.383, line 4 – 15. While there, he waived his Miranda rights and was questioned for over an hour where he maintained his innocence. App. p.60, line 6 – p.61, line 19. The investigators continued questioning when he asked to leave or asked to stop talking, and even brought in his mother to try a new tactic. App. p.70, line 5 – p.71, line 7. The entire interrogation was recorded. At trial, the State sought to play the interrogation for the jury. Trial counsel objected and Jackson v. Denno, 378 U.S. 368 (1964) hearing was conducted. App. p.53. Trial counsel admitted that he was fine with portions of the recording, but contested to other portions under Edwards v. Arizona, 451 U.S. 477 (1981) on the basis that police questioning continued after Petitioner stated that he wanted to stop talking. Judge Seals allowed the recorded statement in, including overruling trial counsel's motion to submit a written transcript rather than playing the audio for the jury. App. p.87, lines 8-9. The audio was played, with portions skipped based on prior objections. App. p.357, line 12 – p.359, line 15. Petitioner was found guilty on all counts. App. p.693, line 22 – p.694, line 8.

A direct appeal was filed in which Petitioner was represented by James A. Brown, Esquire. A single ground was raised in this appeal, which was whether the circuit court improperly admitted hearsay statements contained in the audio recording of the interrogation that identified Petitioner as the perpetrator. This question was certified to the Supreme Court, which affirmed in part, reversed in part, and remanded. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). The majority held that the admission of the interrogation recording was in error, but this error was ultimately harmless in respect to the assault and battery with intent to kill and possession of a weapon during the commission of a violent crime charges. Petitioner is still serving these sentences and they are subject to vacation under this post-conviction relief action.² The admission of the recording was in error, they held, because “investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims. This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer’s guilt to all charges.” Id., 411 S.C. at 406-07, 768 S.E.2d at 659 (emphasis in original). They further held “that the interrogators’ statements were not admissible for purposes of context or for the effect the statements had on Brewer.” Id.

Notably, Justice Beatty concurred in part and dissented in part. Simply put, he agreed that the admission of the interrogation tape was in error and that the murder conviction should have been reversed; however, he did not agree that the error was harmless in relation to the other charges. Id., 411 S.C. at 412, 768 S.E.2d at 661. He held that the admission of the tape created “numerous instances of burden shifting,” which “repeatedly bombarded [the jury] with the unconstitutional notion that Brewer had to prove that he was innocent.” Id., 411 S.C. at 412, 768 S.E.2d at 662.

² His murder sentence was reversed and remanded for a new trial.

ARGUMENT

The post-conviction relief court erred in failing to grant relief to Petitioner on the basis of ineffective assistance of appellate counsel. Though appellate counsel raised a ground that mentioned the improper admission of the interrogation audio, and was somewhat effective on that ground, he could and should have raised further grounds.³ Specifically, appellate counsel was ineffective for not raising the issue that the admission of the entire interrogation recording constituted burden shifting to the point where the fundamentals of due process were violated.

At the risk of going too far back to the fundamentals of American law and constitutional protections, it is well-settled and understood that a defendant is innocent until proven guilty. Though this does not attach at the time of arrest, the protections of Miranda v. Arizona, 384 U.S. 436 (1966) and certain constitutional amendments protect persons in custody from overbroad law enforcement interrogation. Continuing to trial, the defendant is cloaked in a presumption of innocence that attaches at the beginning of criminal proceeding and means he has no burden to prove that his innocent of the crime of which he has been charged. It is solely the prosecution's duty to prove the elements of the crime as alleged. This is referred to collectively as criminal due process and is one of our proudest legal accomplishments as Americans. It is patently clear that this was stripped from Petitioner during his trial. Though Petitioner believes that the Supreme Court could have done more to remedy this (and should have, *sua sponte*), he believes they did not because his appellate attorney did not raise the appropriate issues.

During the post-conviction relief hearing before the Honorable R. Scott Sprouse, Appellate Counsel testified that he believed the hearsay issue that he raised was the only one argued. App.

³ Though space will not be devoted to argument on the topic, Petitioner takes issue with the post-conviction relief judge's holding that, "There can be no stronger argument than a winning argument" for the proposition that appellate counsel provided effective representation to Petitioner. App. p.837, end of first paragraph.

p.813, lines 7-8. He admitted that if a confrontation clause issue were preserved, he should have raised it, but he did not believe it was explicitly argued. App. p.813, lines 3-15. To clarify, the confrontation clause issue in this instance would be that Petitioner did not have an opportunity to cross-examine the speakers on the recording about the content of their speech.

Tellingly, Appellate Counsel admitted during direct examination during the post-conviction relief hearing that “the video-taped statements from the detective during the interrogation that were played before the jury, they clearly shifted the burden to Mr. Brewer. But I’ve never seen a case where the burden shifting was made by a piece of evidence.” App. p. 814, lines 11-15. Further, Appellate Counsel agreed that the burden shifting issue was clearly preserved: “The burden shift was discussed over and over and over again, absolutely.” App. p.814, line 25 – p.815, line 1. Essentially, the only reason that Appellate Counsel did not present the issue is because he did not believe that a piece of evidence could shift the burden, only testimony. He testified that he “just [didn’t] know...that the law is burden shifting if a piece of evidence shifts the burden contained within the evidence itself....if you can show me a case that talks about burden shifting from a piece of evidence. I’m not saying it couldn’t.” App. p.821, line 5-9; p.823, lines 16-19. Repeatedly, Appellate Counsel conceded that the conversation contained on the tape shifted the burden to the defense: “Certainly, the State’s evidence that had [sic] internal component that shifted the burden, and I think that’s kind of interesting. I don’t know whether I’m right or wrong on not raising that.” App. p.823, lines 19-22.

Petitioner is informed and believes that this, in and of itself, is a fatal flaw in Appellate Counsel’s argument. The South Carolina Supreme Court, in its opinion on Petitioner’s direct appeal, opined:

Beyond the hearsay error, we wish to briefly comment on the grave constitutional error in the admission of the challenged evidence in this case. Law enforcement's *ad*

nauseam insistence that Brewer prove his innocence has *no* place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt. *See* U.S. Const. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”); Sandstrom v. Montana, 442 U.S. 510, 512, 99 S. Ct. 2450 (1979) (noting that the Fourteenth Amendment requires that “the State prove every element of a criminal offense beyond a reasonable doubt”).

Brewer, 411 S.C. at 408, 768 S.E.2d 659-60. Certainly, Petitioner disagrees with the Supreme Court’s holding that such error was only harmless in terms of the murder charge. Failing to omit the interrogation tape was error on the level of due process violation because it violated Petitioner’s Fifth and Fourteenth Amendment rights. Appellate counsel failed to raise anything to the court beyond the level of hearsay when blatant due process violations were ripe for the picking. He declined to even address the trial court’s failure to provide a limiting instruction past the usual sentence on the defendant’s lack of obligation to prove his innocence. Instruction at App. p.661, lines 6-13; Initial Brief of Appellant pulled from C-Track, State v. Jaquwn Brewer, 2012-208487.

What Appellate Counsel failed to concede, and what Petitioner believes is the ultimate omission from his argument, is that the trial court’s allowance of this tape and the burden shifting therein created a structural due process error that could not be remedied. As noted by Justice Beatty in his concurrence/dissent from the direct appeal, South Carolina considered the importance of structural due process in State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). The facts of that case involved a trial court that prevented a defendant from testifying on his own behalf because the trial judge felt his potential testimony, offered as a proffer, had the potential of being unfairly prejudicial. The court held this was not grounds to deny his Fifth and Sixth Amendment rights to testify in his own defense. Such an error is so fundamental that it is not subject to harmless error analysis – it is considered structural and is, therefore, reversible. This idea has guidance and basis in the Supreme Court of the United States, whose opinions in Arizona v. Fulminante, 499 U.S.

279, 111 S. Ct. 1246 (1991) and Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, (1967) are cited by Rivera. As our Supreme Court stated in Rivera:

“...there are certain constitutional rights which are “so basic to a fair trial that their infraction can never be treated as harmless error.” *Id.* (quoting Chapman, 386 U.S. at 23). “These are structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards” and which “affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 309-10. “Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Id.* at 310 (quoting Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). Essentially, an error is structural if it is “the type of error which transcends the criminal process.” *Id.* at 311.

Rivera, 402 S.C. at 247, 741 S.E.2d at 705.

It shocks the conscience that the majority of our Supreme Court felt the need to chastise a lower court for a “grave constitutional error in the admission of challenged evidence” but felt no need to go beyond a harmless error analysis. Brewer, 411 S.C. at 408, 768 S.E.2d 659-60. True, the harmless error test is the great balance for constitutional issues; however, it is not the only test in the judicial toolbox. Let us not forget that the Supreme Court applied the harmless error test and still found no prejudice to Petitioner on two of the three counts. This is because they, presumably, felt constrained by the hearsay issue presented by Appellate Counsel.

Petitioner has found no guidance in the case law of this state when considering this particular confluence of facts – an issue of fundamental constitutionality was held to be clear error by everyone but the trial court; appellate counsel briefed an inane portion of the error at issue; the majority of the appellate court said this error was only a minor one; and the fact that Petitioner’s constitutional rights were so fundamentally violated has been passed down the line. This pattern must stop here, and this court must hold that Appellate Counsel was ineffective when he failed to brief that the admission of the interrogation tape was burden shifting. As such, Petitioner’s

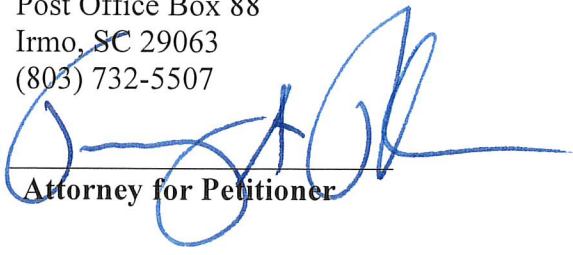
remaining convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime must be vacated.

CONCLUSION

For the above stated reasons, Petitioner's remaining convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Petitioner,
hereby certify that pursuant to the Supreme Court's Order "Operation of the Appellate Courts
During the Coronavirus Emergency, " dated March 20, 2020, that I emailed the corrected covers
of Volume I and II of the Appendix and the Brief of Petitioner, to:

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