STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George M. McFaddin, Circuit Court Judge

MATHEW C. DWYER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002210

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and suddenly advised Petitioner not to testify since such advice was due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense, and where Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if he had testified and presented evidence that he was acting in self-defense during the altercation with the decedent?

STATEMENT OF THE CASE

On the night of January 26, 2015, the decedent, Johnny Singleton, was playing cards with friends. App. 152, l. 16 – 153, l. 8. He left between 9:30 and 10:00 pm. App. 153, ll. 9-12. He was alone. App. 153, ll. 9-12. His phone had been ringing throughout the night and Singleton left upset. App. 155, l. 17 – 156, l. 11. One of Singleton's friends remembered seeing Petitioner at her house when Singleton was also present. App. 154, l. 18 – 155, l. 6.

The police found Singleton's car wrecked backwards in a ditch early the next morning. App. 161, l. 1 – 162, l. 8; App. 166, l. 14 – 167, l. 8. Singleton was dead in the car. App. 83, ll. 15-23. The car was in reverse gear. App. 83, ll. 9-11. Singleton's body was "found in the back seat of the vehicle, in a seated position, with his legs across the center console." App. 83, ll. 17-23. The rear window was shattered, the driver's window was broken, and the passenger front window was down. App. 84, ll. 13-23. The police concluded that the car was damaged from "reversing into the ditch." App. 96, ll. 22-25. The next day, from the autopsy, the police learned Singleton had been shot in the back of the head. App. 95, ll. 20-24.

The police found Singleton's phone in the woods behind the car. App. 120, l. 18 – 121, l. 3. After taking the phone into evidence, an investigator began calling the numbers in Singleton's call history. App. 362, l. 17 – 369, l. 14. The police determined that Singleton and Petitioner had called each other that night. App. 362, l. 17 – 369, l. 14. They executed a search warrant at Petitioner's residence and took him into custody. App. 241, l. 7 – 250, l. 14. Petitioner denied knowing anything about Singleton's death. App. 245, l. 10 – 246, l. 4; App. 250, ll. 9-11.

The police summoned Petitioner's brother, Stephen, to the station and interrogated him for over six hours. App. 297, l. 2 – 299, l. 25. They threatened Stephen with prosecution. App.

301, ll. 14-19. Stephen testified that the police told him that if he did not "say the right thing, I can be charged with accessory." App. 306, l. 6 – 307, l. 2.

The state called Stephen as a witness at trial. App. 263, ll. 21-24. On the night of Singleton's death, Stephen got a call from Petitioner. App. 266, ll. 5-11. Petitioner wanted Stephen to pick him up on Highway 521 in Sumter County. App. 266, l. 21 – 268, l. 22. When Stephen picked him up, Petitioner "looked beat up. Like really beat up." App. 268, ll. 23-25. Petitioner "looked like he was in a fight." App. 269, ll. 5-6. Petitioner's hand was bleeding. App. 269, ll. 18-21. Stephen took him home. App. 270, l. 25 – 271, l. 11.

Stephen later saw Singleton's death on the news and asked his brother what happened. App. 273, l. 10 – 274, l. 5. Stephen testified about what Petitioner told him:

> Well he just said, I ain't know if he had been knowing this man or not. But in the car, he said [the] man gave him the wallet. Being that was the type of person he was, I guess the man had – he said the man had gave him the wallet earlier because he wanted favors. **He wanted like sexual favors.** I didn't know why they was going up there, but he wanted sexual favors. Matthew [Petitioner] said that the man gave him the wallet before anything ever went down. **And then on the way, on the way going there, I guess, he wanted Matthew to do some things for him. And Matthew just told me that he ended up pulling over. And that's when they pulled over. And he's probably force himself and they got in a tussle or whatever.**

App. 276, ll. 1-15 (emphasis added). Stephen continued:

> And yeah, he just say that **after they pulled over, the man had really got more aggressive and try to force him to do whatever. And that's how he got into a fight.** And when **he say as they was fighting, he stumbled across a gun**.... I guess it was in the man's car already. **And that's when he just picked it up, and he said he shot him.** He didn't know if he was dead or not. He just got out of the car and then called me.

App. 277, ll. 1-10 (emphasis added).

The solicitor attempted to impeach Stephen with a statement the police typed, Stephen signed, and was entered into evidence. In this statement, Stephen told the police that "Matthew told me that him and the dude was tussling in the car, and that the dude knew Karate, and had been military. And he got scared and said that he shot him in head." App. 289, ll. 6-20. Petitioner and Singleton "were tussling" in the car and after Singleton got shot, "the car was wrecked and hit a tree." App. 289, ll. 6-20. Stephen's statement also says, "Matthew told me that the dude that got killed was a [fagot], that he used to rape boys." App. 291, ll. 3-5.

On cross-examination, Stephen testified:

Q: . . . [Y]our brother told you that there was a tussle, is that right?

A: That's right.

Q. There was a fight.

A. That's right.

Q. He was scared, is that correct?

A. That's correct.

Q. I mean, that's in your statement. Your brother told you he was scared, is that right?

A. That's right.

Q. He also told you that this individual knew karate. Is that right?

A. That's correct.

App. 302, l. 18 – 303, l. 15.

During the charge conference, trial counsel requested the judge charge the jury on self-defense. App. 415, l. 15 – 417, l. 7. He cited Stephen's testimony and the statements entered into evidence showing Petitioner was scared and that his actions were reasonable. App. 415, l.

15 – 417, l. 7. Counsel asserted that "no matter how small, the evidence is there to at least offer that charge in self-defense." App. 415, l. 15 – 417, l. 7.

The solicitor maintained there was no "evidence of self defense whatsoever." App. 418, ll. 3-25. The trial judge agreed. She ultimately ruled:

> In regards to the self defense issue, Mr. Keffer [trial counsel], the court will respectfully deny your motion. The court finds that **there is no testimony to establish the elements of self defense**; that the defendant was without fault, and the defendant was imminent danger, and that there was no other way to avoid the danger. The testimony did not establish those three elements.

App. 419, ll. 1-8 (emphasis added).

A Sumter County grand jury indicted Petitioner on July 9, 2015 for murder and possession of a weapon during the commission of a violent crime. App. 620-621. His case was called to trial on October 19, 2015 before the Honorable Maite Murphy, and a jury. App. 1. Assistant Solicitor John P. Meadors represented the state, and John S. Keffer represented Petitioner. App. 1. On October 23, 2015, the jury found Petitioner guilty as indicted. App. 478, l. 21 – 479, l. 14. He was sentenced to forty-five years for murder and five years concurrent for the weapons offense. App. 489, l. 16 – 490, l. 4.

Petitioner challenged the trial judge's decision not to charge self-defense on direct appeal. He argued:

> The trial court erred in refusing to charge self-defense when evidence showed that appellant and the decedent, who was ex-military and knew martial arts, got into a fight after a sexual advance in the decedent's moving car and that appellant was scared.

App. 497.

The Court of Appeals affirmed Petitioner's convictions and sentence holding there was no evidence from which it could reasonably be inferred that Petitioner acted in self-defense and

therefore he was not entitled to a self-defense instruction. State v. Dwyer, 2017-UP-440 (S.C. Ct. App. December 6, 2017); App. 529-530.

On May 21, 2018, Petitioner filed an application for post-conviction relief raising the claim argued in this petition. App. 532-541. The state filed a return to this application dated July 26, 2018. App. 542-554. An evidentiary hearing was convened on November 16, 2018 before the Honorable George M. McFaddin, Jr. App. 555. Assistant Attorney General Susannah Cole represented the state, and Timothy Griffith represented Petitioner. App. 555.

During the evidentiary hearing, Petitioner testified that his trial strategy was to argue self-defense. App. 567, l. 22 – 568, l. 4. This was the only defense he and trial counsel had discussed. App. 568, ll. 2-3. The plan before trial was for Petitioner to testify and tell his "side of the story." App. 564, ll. 16-22. Petitioner explained, "The whole week [of trial] me and him [trial counsel] agreed that I was going to testify." App. 565, ll. 9-12. However, all of a sudden on the fourth day of trial after eleven witnesses had testified for the state, including Petitioner's brother, trial counsel told Petitioner "it would be a bad idea for [him] to testify." App. 565, ll. 12-15. Counsel told Petitioner it was not necessary for him to testify because his brother, Stephen Dwyer, "testified in [Petitioner's] favor." App. 565, ll. 12-15. Consequently, based on counsel's advice, Petitioner did not testify at trial. App. 565, ll. 9-10.

At the hearing, Petitioner made clear, "I wanted to testify. This was a self-defense case. Without my testimony, the jury . . . wouldn't know what happened in the vehicle because me and the deceased was the only two involved and they [the jurors] never got the opportunity to hear my side of the story." App. 564, ll. 17-22. He asserted the outcome of his trial would have been different if he had testified. App. 564, l. 23 – 565, l. 1.

Petitioner's testimony at the evidentiary hearing that his trial strategy was self-defense and that he had always planned to testify was corroborated by trial counsel's opening statement to the jury. Counsel told the jury:

> Mr. Dwyer [Petitioner] comes to this courtroom with the presumption of innocence. And that's the foundation of our law. . .
>
> Now Mr. Meador's [the solicitor] job is to start taking off that cloak of the presumption of innocence. And he laid out certain facts, which are not in dispute. Mr. Dwyer [Petitioner] knew Mr. Singleton. [They] were together that night. We know that there [were] conversations that day. We know from cell phone records they knew each [other] and they spoke. The rest of it is pure speculation. Because the reality of it is, Mr. Singleton picked up Mr. Dwyer about 9:30, 10:00 o'clock.
>
> Mr. Singleton is actually from Camden. Which is why they were on [Highway] 521. And they were driving on 521. And we believe the evidence is going to show that Mr. Dwyer asked to get out of the car; that he felt uncomfortable; that he asked several times for Mr. Singleton to stop the car. And the car did stop. And Mr. Singleton was driving, and there was a fight and there was an altercation. And that is something the State didn't present to you, because they don't want [you] to consider that. But that's the reality and that's what happened.
>
> We're not going to spend 2 or 3 days worrying about who called who, when and where. Because we know that they spoke. And we know that they're together, and you're going to hear that. What we will discuss, and what I will proffer; is that, **this is a case of self-defense. There was a fight, and there was a disagreement and there was an altercation.** And that is not in dispute. What's also not in dispute is Mr. Singleton's death. He died January 26th. He died of a bullet hole. **Mr. Dwyer [Petitioner] is not going to get up there and say that didn't [happen].** ***He is going to get up there and explain why it happened.*** **What were the facts and circumstances behind that. Why were they there? Why was he is the car? What was his relationship with Mr. Singleton? Did they know each other before?** They were not strangers. They knew each other before.
>
> . . .
>
> **What is in dispute is what happened to these two people in that car. Why did the car stop? Why was it found the way it was found? Why was the cell phone where it was found? What exactly happened?** ***We believe that the evidence is going to suggest, is going to show this is a case of self-defense.*** **That is not murder.**

Mr. Dwyer is not going to say this didn't happen. He's going to explain why it happened.

App. 76, l. 5 – 76, l. 25 (emphasis added).

Petitioner's testimony was further corroborated by trial counsel, John Keffer. Keffer explained at the evidentiary hearing that during his first meeting with Petitioner, Petitioner "had claimed it was in self-defense, that the victim in the case was an alleged sexual offender, that he had known the victim, that the victim had tried to assault him and he was defending himself and he had maintained that pretty much from day one." App. 574, ll. 3-10. Keffer said he "vigorously pursued" self-defense and that his intent was to present evidence to support that Petitioner was acting in self-defense during the altercation with Singleton. App. 575, ll. 8-22. He repeated several times throughout his testimony that Petitioner intended to testify in his defense. App. 588, ll. 11-16; App. 589, ll. 19-23; App. 591, ll. 15-20.

Keffer asserted that he ultimately advised Petitioner not to testify because of a letter Petitioner wrote to Demetrius Cooper in March 2015 asking Cooper to create an alibi for Petitioner for the night the decedent died and to explain how Petitioner injured his hand that evening. Keffer said he learned of this letter "either on the eve of trial or shortly after a jury was impaneled." App. 577, ll. 1-21. He maintained the letter "completely, completely changed the case." App. 578, ll. 16-20. The case went from Petitioner was acting in self-defense "to now he's searching for an alibi." App. 578, ll. 16-20. According to Keffer, this is why Petitioner did not testify. App. 578, ll. 16-23. Keffer refused to acknowledge that Petitioner may have written the letter to Cooper out of fear since he was facing life without parole, and to do whatever he could to avoid a trial and conviction. App. 583, l. 23 – 585, l. 19.

By order filed November 30, 2018, the PCR judge ultimately denied Petitioner relief finding Petitioner failed to prove trial counsel was deficient. App. 606-619. The judge found

counsel's advice to Petitioner not to testify because counsel believed Stephen Dwyer's testimony and statements concerning what Petitioner told him after the altercation "were enough to request a self-defense charge" was not deficient. App. 618. The judge further found that counsel's advice to Petitioner that it "was too risky" for Petitioner to take the stand and explain why he wrote the letter to Demetrius Cooper asking Cooper to create an alibi for him was reasonable. App. 616-617. The judge ultimately concluded that trial counsel articulated a valid strategic reason for advising Petitioner not to testify in his defense. App. 617.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and suddenly advised Petitioner not to testify due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense, and because Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if he had testified that he was acting in self-defense during the altercation with the decedent, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and suddenly advised Petitioner not to testify since such advice was due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense, and where Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if he had testified and presented evidence that he was acting in self-defense during the altercation with the decedent.

Petitioner had consistently maintained his desire to testify in his defense at trial. Trial counsel admitted the strategy before trial was that Petitioner was going to testify. Counsel even informed the jury during his opening statement that Petitioner would testify and show he was acting in self-defense. However, in the middle of trial, counsel suddenly advised Petitioner that he should not take the stand due to the letter Petitioner had written to Demetrius Cooper requesting Cooper create an alibi for him for the night of the altercation. This constituted deficient performance because, in giving such advice, counsel failed to utilize his discretion and demonstrated his misunderstanding of the law of self-defense and the requirements needed to obtain a jury instruction on self-defense.

Any reasonably competent criminal defense attorney would have known that it would be near impossible to establish Petitioner was acting in self-defense during the physical altercation with the decedent without Petitioner's testimony. Counsel also should have known that the trial judge was going to refuse to charge self-defense based only on the evidence presented during the state's case in chief.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that the outcome of Petitioner's trial would have been different if he had testified in his defense and presented evidence that he was acting in self-defense.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove 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." Id. at 686; 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.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "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).

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment

with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Rule 609, SCRE). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), this Court held trial counsel was ineffective when he failed to consider the possibility of Foye testifying in his defense given the evidence presented at trial. Foye was charged with trafficking cocaine. Id. at 588, 518 S.E.2d at 266. He was tried jointly with his father. Id. at 591, 518 S.E.2d at 268. After his father told Foye's counsel that he would testify Foye did not know cocaine was in the gym bag, counsel advised Foye not to testify because of his prior convictions. Id. However, at trial, his father testified he told Foye cocaine was in the gym bag as the pair were walking into the hotel to deliver the drugs and that Foye wanted to help his father because he was afraid his father would get hurt. Id. The two passed the bag back and forth before his father insisted Foye should not get involved and took the bag away from him prior to entering the hotel. Id. Foye waited in the lobby while his father delivered the cocaine. Id.

This Court held Foye's counsel was ineffective because he did not consider the possibility of Foye testifying after his father's damaging testimony. Id. at 592, 518 S.E.2d at 268. The Court concluded "counsel failed to use his discretion in employing an appropriate trial strategy in light of the unexpected testimony." Id. The Court emphasized counsel's admission that it may have been proper to put Foye on the stand after his father's damaging testimony. Id.

In this case, trial counsel was deficient because he abandoned his trial strategy midtrial and failed to utilize his discretion when he advised Petitioner not to testify. His advice was also based on a misunderstanding of the law of self-defense. It is undisputed that Petitioner's trial strategy was to argue self-defense and that he intended to testify. Counsel informed the jury during his opening statement that Petitioner was going to testify and that he was acting in self-defense during the altercation. See App. 76, l. 5 – 76, l. 25. However, because of a letter Petitioner wrote to a friend requesting he create an alibi for Petitioner, counsel threw his strategy out the window, and advised Petitioner not to testify. This advice was based on counsel incorrect belief that the trial judge would charge self-defense based on Petitioner's brother's testimony alone. Moreover, Petitioner could have easily explained to the jury why he wrote the letter to Demetrius Cooper, despite asserting he was acting in self-defense during the altercation. Petitioner was facing a murder charge, which carries up to life without parole, and was desperate to avoid a trial and conviction.

Petitioner was prejudiced by trial counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if Petitioner would have testified that he was acting in self-defense during the altercation with Singleton, which Petitioner had maintained since "day one." App. 574, ll. 3-10. Because of counsel's faulty advice, Petitioner ultimately did not testify, and counsel was forced to argue lack of malice and voluntary manslaughter in closing, which completely contradicted what counsel told the jury during his opening statement.

Respectfully, this Court should reverse the ruling of the PCR judge, vacate Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

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MATHEW C. DWYER,

PETITIONER

V.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Matthew Cory Dwyer, #346172, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of July, 2019.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of July, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.