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SC Court of Appeals

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

Jaquwn Brewer #347482, ... Petitioner

vs.

State of South Carolina, ... Respondent.

REPLY TO BRIEF OF RESPONDENT

Tommy A. Thomas, Esq.
Attorney for Petitioner
7588 Woodrow Street
Post Office Box 88
Irmo, South Carolina 29063
(803) 732-5507

Donald J. Zelenka
Office of the Attorney General
Attorney for Respondent
Post Office Box 11549
Columbia, South Carolina 29211-1549

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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?

Respondent's Statement of the Issue

Relief is not warranted where probative evidence supports the conclusion the appellate counsel was not ineffective under *Strickland v Washington*, 466 U.S. 668 (1984) when counsel failed to present an evidentiary issue that Petitioner claims was "burden shifting" and required a new trial on assault and battery with intent to kill where 1) the alleged evidentiary errors were trial errors and not structural errors and 2) there is no reasonable probability that the result of the appeal would have been different, particularly where the Supreme Court had determined the trial error was harmless

ARGUMENT

The bulk of Respondent's brief is spent in an attempt to show that the harm done to Petitioner by receiving ineffective assistance of appellate counsel is anything but the structural due process error that it is. Petitioner will respond to these arguments in turn.

Initially, Respondent cites a number of United States Supreme Court cases that can only serve as guidance to this court because they were decided based on the law of other states. Respondent goes so far as to twice imply that it was error for Petitioner not to do so, especially in not citing to Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979). Petitioner maintains that the most relevant law on this topic is found in opinions of this state's appellate courts as it reflects the precedent by which this court is directly bound. In this instance, State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013) is the most informative opinion on the topic. When Respondent did cite to South Carolina cases, the description of the holdings was not on point, such as a citation to Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) that listed the "holding" as dicta containing evidence from the record.

Regardless, Petitioner admits that despite effectively arguing that he received ineffective assistance of appellate counsel, he did not cite to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) and directly outline the two-pronged test. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) ("Generally, in analyzing a claim of ineffective assistance of appellate counsel, this [c]ourt applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel."). As stated in Petitioner's initial brief, Appellate Counsel conceded at the post-conviction relief hearing that the conversation contained on the interrogation 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. 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 1.¹

Petitioner takes umbrage with Respondent’s allegation that he suggests the error here is equivalent to an instructional error that shifts the burden of proof.” Respondent’s Brief, p.21. While Petitioner is alleging a shift in the burden of proof and harm as a result due to appellate counsel’s failure to brief it, the magnitude of this error is such that it violates vital constitutional protections. Rather than experiencing an erroneous jury instruction, Petitioner had the protections of the presumption of innocence stripped away in the midst of trial due to the admission of inappropriate hearsay testimony. “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.” Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, (1991) (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 (2013).

In not pursuing the argument as burden-shifting and rather viewing it as only hearsay, appellate counsel failed to address the more fundamentally detrimental reality of the admission of this testimony. Petitioner does not allege that Appellate Counsel was incorrect in describing the testimony as hearsay; however, this hearsay transcended into an error so fundamental that it violated Petitioner’s due process. Clearly, by putting Petitioner in a position where he needed to

¹ Respondent noted in footnote 6 of its brief that a citation to p.815 in Petitioner’s petition for writ of certiorari was incorrect. Petitioner concedes that the context of the citation to p.815, lines 14-18 was incorrect; however, he maintains that the instant citation is correct, and it was the only one noted in Petitioner’s brief.

prove his innocence, this testimony caused great harm. In failing to brief it as an issue, Appellate Counsel provided deficient performance to the degree that Petitioner was prejudiced by the deficiency. Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Upon review, the presumption of effective assistance will be overcome when the alleged ignored issues are clearly stronger than those raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

As acknowledged by Respondent, such error does not require immediate reversal, though it is not out of the question. Respondent's Brief, p.33. The court in Weaver v. Massachusetts, 137 S.Ct. 1899 (2017), the opinion on which Respondent relies, declined to decide whether there was ineffective assistance of counsel due to the ultimate holding of the court. Id. at 1911. However, it held that "even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." Id. Though the case at bar considers an appeal, our Supreme Court has held that the same parameters for review apply. Therefore, even if this honorable court decides that this is not a matter of structural error that warrants immediate reversal, it still possesses enough evidence and argument to determine that appellate counsel's failure to brief the burden-shifting argument was ineffective assistance of counsel warranting reversal. Petitioner's convictions must be vacated.

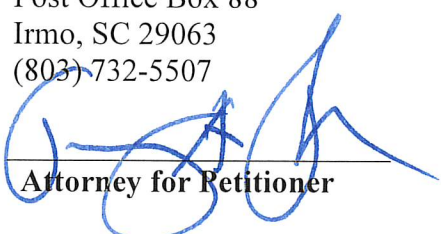
CONCLUSION

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,

TOMMY A. THOMAS
Bar No.: 005536
Post Office Box 88
Irmo, SC 29063
(803) 732-5507

By:


Attorney for Petitioner

7588 Woodrow Street
Irmo, South Carolina 29063

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