

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2021-UP-290 (S.C. Ct. App. filed August 4, 2021)

Lower Court Case No. 2014-CP-18-01001

RANDAL WILLIAM BENTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001098

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Court of Appeals erred by concluding Petitioner suffered no prejudice where the plea judge refused to accept Petitioner's guilty plea because he correctly answered he had not reviewed "every bit" of the evidence against him where trial counsel admitted he withheld evidence from Petitioner prior to the attempted guilty plea.

In its "statement of the facts," the state continues its campaign of misleading information. Even though the Court of Appeals made clear that the record provided no support for the proposition that trial counsel believed Petitioner did not agree during the plea hearing with the state's reference to a broken picture frame, the state continues to press forward with this revisionist history. The state wrote, "Notably, Petitioner testified at trial and claimed to have 'blacked out' immediately before the shooting, but he did not challenge any of the facts recited by the solicitor at the plea proceeding except for a minor point about Petitioner having smashed a picture of himself and [the deceased] the night before the murder and the conversation he had with [the deceased]'s neighbor." Ret. at 6. At best, this sentence is poorly worded; at worst, it is intentionally misleading.

The record evidence is absolutely clear: Petitioner did *not* challenge any of the facts presented by the solicitor at the guilty plea hearing. During the guilty plea hearing, the solicitor claimed that Petitioner "went back to his house and smashed a picture that he had located on the night stand of himself and [the deceased]." App. 21, ll. 9-11. During the guilty plea hearing, the solicitor also claimed that Petitioner "confronted a neighbor who indicated that they may have, in his words, they may have gone back to his house or something to that effect signifying that she may be with her new boyfriend." App. 21, ll. 1-4. Again, Petitioner did *not* challenge these facts or any of the other facts pronounced by the solicitor.

When Petitioner testified at his trial, he admitting to arguing with the deceased, but he did not remember what happened after the two argued and the deceased struck him. App. 360, ll. 14-20. Petitioner admitted the evidence showed he shot the deceased, but he did not recall doing so. App. 360, l. 21 – App. 361, l. 2. Regarding the picture frame, the testimony was as follows:

Q So the picture of you and [the deceased] that was on your night stand that was smashed, when did that happen?

A There was no picture of my wife and me on the night stand, sir.

Q You deny that? Or you don't remember, right?

A No sir.

[Defense counsel]: Objection, Your Honor. He is not allowing him to finish his answer.

The Court: Sustained.

Q (By [the solicitor]) Let me let you finish your answer. You deny that?

A No, sir. I did have a picture of me and my wife, but it wasn't on the night stand, sir.

Q Do you remember the picture being broken?

A Yes sir, it was broken.

Q And since the last time you were in your room was before you went to the bar, that picture was broken before you went to the bar, right?

A Yes, sir. Four days that picture was broken, sir.

App. 392, ll. 5-24.

Also, at trial, Petitioner admitted going to the deceased's house and talking to her neighbor prior to the shooting. The precise testimony is as follows:

Q (By [the solicitor]) All right. And then later that day on October 30th, 2010, around the - - I guess it was about eight o'clock or so, do you remember going over to Scott Herbert's house? [The deceased]'s neighbor?

A I didn't go to his house, no sir.

Q You didn't go over there earlier that day?

A No, sir.

Q You don't remember going and asking where [the deceased] was?

A No, sir. When I went by there to see if she was home, as I left they were standing outside smoking cigarettes. And I made the comment, as I was going back to my vehicle, I think he or I believe it was he that made the comment, you just missed her. And I said, yep. And I got in the vehicle and I left.

Q Okay, but the question was did you go over there earlier that day?

A Oh, yes sir.

Q So you did talk to Scott Herbert that day?

A I made a comment as I was passing, yes, sir.

App. 363, l. 18 – App. 364, l. 12.

The record undisputedly shows that the state's suggestion that Petitioner challenged the factual recitation by the solicitor *during the plea hearing* regarding "a minor point about Petitioner having smashed a picture of himself and [the deceased] the night before the murder and the conversation he had with [the deceased]'s neighbor" is entirely false. The Court of Appeals correctly acknowledged the PCR court misstated this evidence, just as the state continues to do. See Benton v. State, Op. No. 2021-UP-290 (S.C. Ct. App. filed Aug. 4, 2021); Supp. App. 1-3.

The state claimed "Petitioner's continued reliance on Lafler, Frye, Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), and Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014) as applicable to the current case is misguided and misconstrues the scope of the issue before the Court." Ret. at 13. According to the state, "Frye, Davie, and Bell discuss factual scenarios in

which plea counsel failed to communicate plea offers to defendants. The facts and allegation in the case at bar are distinguishable from those cases as there is no allegation the offer in this case was not communicated.” Ret. at 13. Apparently, only if a case is on all fours with precedent may the precedent be cited and used as authority in a subsequent case. The state’s rationale must be rejected because all cases present new and different facts to which appellate courts must apply broad principles announced in appellate decisions. Furthermore, the state’s claim is disingenuous because the state actually cited to Lafler v. Cooper, 566 U.S. 156 (2012), Missouri v. Frye, 566 U.S. 133 (2012), and Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) when discussing the applicable law. Ret. at 12. Similarly, the Court of Appeals described Lafler and Frye as “[t]he key cases from the U.S. Supreme Court [that] establish the standard for this sort of claim to be successful.” Benton v. State, Op. No. 2021-UP-290 (S.C. Ct. App. filed Aug. 4, 2021); Supp. App. 1-3. The state filed no petition for rehearing to challenge the Court of Appeals’ application of those “key cases” to this case. Thus, the state’s disparagement of Petitioner by calling the citation to these authorities as “misguided,” especially in light of the state’s acknowledgment that the cases provide the controlling law, is contrived.

Next, the state faults Petitioner for “fail[ing] to specify what evidence counsel allegedly failed to review with him.” Ret. at 14. Admittedly, Petitioner testified during the PCR hearing that he could not remember what he had not reviewed at the point that was prior to the guilty plea hearing. App. 550, ll. 15-25. However, not only was such testimony entirely reasonable considering the time that had elapsed and the intervening trial, but the PCR judge concluded Petitioner’s testimony was not credible. App. 592. Yet, trial counsel testified – credibly, according to the PCR judge – that he did not show the autopsy photographs to Petitioner prior to

the guilty plea. App. 554, ll. 18-23; App. 592. Thus, the undisputed, credible evidence is that trial counsel failed to show the autopsy photographs to Petitioner prior to the plea.

Much like the Court of Appeals did, the state contorts the record to argue the plea judge would not have accepted the plea because of matters other than trial counsel not providing Petitioner with “every bit” the evidence against him. Ret. at 16-18. The plea judge was very clear and very frank in her reason for not accepting the guilty plea:

I’m not going to take the plea. If he doesn’t know the evidence and he can’t tell me if he believes that that’s the evidence that the state has and he’s been over it and he thinks there’s evidence he hadn’t been over I can’t take the plea.

App. 27, ll. 11-15. The judge expressed none of the concerns now espoused by the state. Again, the state is engaging in revisionist history in order to maintain a conviction. Even if the plea judge was not happy with the plea negotiations, she was inclined to accept the guilty plea as shown by the very fact that she was presiding over the plea hearing. She was aware of the terms prior to taking the bench according to the credible testimony of plea counsel; yet, she did not refuse to accept the plea based upon the terms. Rather, it was only when she learned that Petitioner had not reviewed “every bit” of the evidence that she refused to accept the guilty plea.

The undisputed, credible evidence showed that trial counsel failed to show autopsy photographs to Petitioner prior to the guilty plea. The undisputed, credible evidence showed the plea judge refused to accept the guilty plea because Petitioner told her that he had not reviewed “every bit” of the state’s evidence against him. The undisputed, credible evidence showed trial counsel did not show the photographs to Petitioner to ameliorate the plea judge’s concern or explain to the plea judge that Petitioner has not seen some of the evidence, specifically, the autopsy photographs. Had trial counsel performed reasonably in his representation of Petitioner, then there is a reasonable probability that the plea judge would have accepted the guilty plea.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with briefing, Petitioner respectfully requests this Court reverse the decision of the PCR judge, reverse his conviction, and remand for a new trial or for resentencing of Petitioner according to the terms of the plea offer rejected by the plea judge due to trial counsel's ineffectiveness.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of November, 2021.