RECEIVED
Jan 04 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

ROBIN GRAY REESE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000141

BRIEF OF PETITIONER

TAYLOR D. GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 5

ARGUMENT 6

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986) 8

Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017) 23

Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998) 26

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 15

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 15

Curtis v. Blake, 381 S.C. 189, 672 S.E.2d 576 (2009) 11

Deck v. Missouri, 544 U.S. 622, 626 (2005) .... passim

Diamond Jewelers v. Naegele Outdoor Advertising, 290 S.C. 260, 349 S.E.2d 888 (1985) 11

Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002) 26

Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995) 11

Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340 (1986) 19

Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) 17, 18

Illinois v. Allen, 397 U.S. 337 (1970) 16

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 5

McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) 9

Ness v. Eckerd Corp. 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002) 11

Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431 (2018) 12

People v. Clyde, 18 N.Y.3d 145, 961 N.E.2d 634 (2011) 20

People v. Flores, 62 N.Y.S.3d 68, 153 A.D.3d 182 (2017) 20

Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000) 5

Rosamond v. Lucas-Kidd Motor Co., 182 S.C. 331, 189 S.E. 641 (1937) 23

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) 5

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 5

Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017) 11

State v. Brewer, 411 S.C. 401, 768 S.E.2d 656, (2015) 24, 25

State v. Heyward, 432 S.C. 296, 852 S.E.2d 452 (Ct. App. 2020) 19

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) 25

State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) 23

State v. Miller, 197 N.C. App. 78, 676 S.E.2d 546 (2009) 24

State v. Sapps, 295 S.C. 484, 369 S.E.2d 145 (1988) 26

State v. Tucker, 320 S.C. 206, 464 S.E.2d 105 (1995) 16, 17

Strickland v. Washington, 466 U.S. 668 (1984) 15, 20

Statutes

S.C. CODE ANN. § 17-27-80 .....3, 9

S.C. CODE ANN. § 16-3-210(B) (Supp. 2017). 6

Other Authorities

Rule 59(e), SCRCP .....passim

Constitutional Provisions

U.S. CONST. amend. VI 15

U.S. CONST. amend V 18

U.S. CONST. amend XIV 18

ISSUES PRESENTED

I. Whether the PCR court erred as a matter of law when it found that Petitioner's Motion to Alter or Amend was untimely, where it was served on the tenth day as required by Rule 59(e), SCRCP, where the PCR court conflated the service and filing of a motion, and where the court incorrectly concluded it no longer had jurisdiction to alter its November 19 judgment?

II. Whether the PCR court erred in finding that Petitioner was not prejudiced by trial counsel's failure to object to Petitioner wearing both wrist and ankle shackles in view of the jury throughout the trial, where Petitioner was shackled the entire duration of trial, including the time when Petitioner walked to and from the witness stand in full view of the jury?

III. Whether the PCR Court erred in finding that trial counsel rendered effective assistance of counsel where he failed to object to Sergeant William Pegram's testimony that "in my opinion of the law, everybody involved in this case was guilty but I had to determine the principal parties in the case," which invaded the province of the judge and jury?

STATEMENT

Indictment and Trial

On October 5, 2011, the Richland County Grand Jury returned an indictment against Petitioner Robin Reese for lynching, first degree. On October 5, 2011, the Grand Jury returned an additional indictment against Reese for murder. App. 1505 – 1508.

On February 28 – March 2, 2012, Reese appeared for trial before the Honorable Thomas G. Cooper, Jr. and a jury. Reese was represented by Andrew Farley. Jointly tried co-defendant Henry Gray was represented by Mathias Chaplin. The state was represented by assistant solicitors Luck Campbell, April Sampson, and Nicole Simpson. The jury returned verdicts of guilty as to both indicted offenses against both Reese and Gray. App. 1158 – 1159. Judge Cooper sentenced Reese to concurrent terms of thirty years' incarceration. App. 1180, l. 23 – 1181, l. 7.

Direct Appeal

Reese's direct appeal was perfected by the filing of a brief of appellant by Appellate Defender Katherine Hudgins. App. 1186. The state, represented by senior assistant attorney general William Edgar Salter, III, filed its brief of respondent. App. 1210. After holding oral argument, this Court affirmed Reese's convictions and sentences in an unpublished opinion filed July 30, 2014. App. 1258. The case was remitted to the lower court on August 15, 2014. App. 1260.

Post-Conviction Relief

On September 14, 2014, Reese filed an application for post-conviction relief ("PCR") alleging ineffective assistance of trial counsel. App. 1261. The state filed its return on March 11, 2015. App. 1268. On August 30, 2016, an evidentiary hearing was held before the

Honorable Jocelyn J. Newman. Reese was represented by Jonathan Waller, and the state was represented by assistant attorney general Jessica Kinard. App. 1273. At the outset of the PCR hearing, PCR counsel placed on the record several oral amendments regarding additional allegations of ineffective assistance of trial counsel, all of which had been disclosed to the state at least ten days prior to the hearing. App. 1277, l. 9 – 1278, l. 8. The PCR court was then presented with testimony from both Reese and trial counsel Farley. App. 1274.

At the conclusion of the hearing, Judge Newman asked both parties to prepare proposed orders. App. 1337, ll. 13-19. PCR counsel submitted a detailed proposed order. App. 1339. However, it was the state's proposed order denying post-conviction relief that Judge Newman signed and filed on November 14, 2016. App. 1353. On December 1, 2016, PCR counsel filed a motion to amend pursuant to Rule 59(e), SCRCP, arguing that the Order of Dismissal did not "contain specific findings of fact and conclusions of law regarding each of the claims presented at the evidentiary hearing, as required by S.C. CODE ANN. § 17-27-80" and that the summary of testimony in the Order of Dismissal "is not an objective, true, and accurate recitation of the testimony presented during the evidentiary hearing." App. 1365. The state filed a return to the motion on December 14, 2016. App. 1367. On April 21, 2017, Judge Newman filed a form order denying the motion to amend. App. 1370.

Prior Appeal and Remand

Appellate Defender Laura Baer filed a twenty-four page, four-issue petition for writ of certiorari on December 27, 2017. App. 1372 – 1397. One of the issues raised was that "[t]he PCR court erred where it failed to make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented as required by S.C. Code An. § 17-27-80." Id. In response and in lieu of a return, the state filed a Motion for Remand for Specific Findings

of Fact and Conclusions of Law Pursuant to S.C. Code Section 17-27-80 on April 20, 2018. App. 1399 – 1401. The undersigned then filed a Return to the state's Motion on April 30, 2018. App. 1403 – 1411. The state filed a Reply to the Return on May 4, 2018. App. 1412 – 1415. The South Carolina Supreme Court granted the state's motion by way of an Order dated October 18, 2018. App. 1417 – 1419. That Order outlined the following procedure:

> We find the circuit court erred by signing the PCR order and in denying Reese's Rule 59(e) motion. We vacate both orders, remand the case to the circuit court for the entry of a new PCR order that complies with the law, and dismiss this appeal. The new PCR order shall be entered within thirty days. The circuit court must notify the Clerk of this Court in writing that it has complied with our directive in a timely manner. Following the issuance of a legally sufficient PCR order and a ruling on any Rule 59(e) motion that may thereafter be filed, the aggrieved party may serve and file a new notice of appeal.

App. 1419.

The undersigned submitted a proposed Order Granting Post-Conviction Relief. App. 1420 – 1440. In response, the state submitted a proposed Amended Order of Dismissal. App. 1441 – 1467. On or about November 19, 2018, Judge Newman signed an Amended Order of Dismissal. App. 1468 – 1489. This Amended Order was filed the same day. Respondent mailed a copy to the undersigned on November 27, 2018. App. 1490. A copy was sent electronically the same day as well. App. 1491.

Ten days later, on December 7, 2018, the undersigned served a Motion to Alter or Amend the Amended Order of Dismissal under Rule 59(e), SCRCP. App. 1492 – 1497. A Form 4 Order was filed on January 10, 2019. App. 1498 – 1499. Accompanying the Form 4 Order was an Order Denying Applicant's Motion. App. 1500 – 1504.

This appeal follows.

STANDARD OF REVIEW

Appellate courts defer to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

I. The PCR court erred as a matter of law when it found that Petitioner's Motion to Alter or Amend was untimely, where it was served on the tenth day as required by Rule 59(e), SCRCP, where the PCR court conflated the service and filing of a motion, and where the court incorrectly concluded it no longer had jurisdiction to alter its November 19 judgment.

Introduction

Petitioner Reese and her brother, Henry "Six" Gray, were jointly tried for the murder and lynching[1] of Kenneth Mack. Reese's daughter, Lucy, who was thirteen at the time of the incident, testified that she walked to get her nails done but arrived to find that the salon was closed. Mack, whom Lucy did not know, saw her knock on the locked door of the shop and said "you can come in my house." App. 919, l. 24 – 924, l. 11. Rather than going with Mack, Lucy went to the local store where Reese was playing video poker. She purchased a bag of chips and headed back to the family's apartment at Gonzales Gardens on McDuffie Avenue in Columbia, South Carolina. App. 924, l. 12-15; App. 930, ll. 11-16; App. 934, l. 14 – 936, l. 13; see App. 258, l. 8 – 261, l. 10.

Mack approached Lucy again. When she tried to avoid him, Mack threw a snowball at her. When Lucy said she was going to get her mom, Mack grabbed Lucy's jacket with his right hand. Lucy slapped Mack. Mack picked Lucy up and threw her down between two bushes and began "tussling" with her. App. 924, l. 16 – 925, l. 13. Marcellius "Bloom" Brooks and a group

---

[1] The former crime of lynching was defined in section 16–3–210 of the South Carolina Code (2003). The section was amended effective June 2, 2010 and redefined first-degree lynching as "assault and battery by mob in the first degree." S.C. CODE ANN. § 16-3-210(B) (Supp. 2017).

of other young men intervened and got Mack off of Lucy. They punched and kicked Mack, and Lucy hit Mack a couple of times too. App. 925, l. 14 – 926, l. 7; see also App. 245, l. 10 – 249, l. 2; App. 254, l. 12 – 261, l. 5; App. 556, l. 8 – 562, l. 17; App. 656, l. 21 – 664, l. 3. Mack eventually got away and was seen stumbling through the area. App. 249, ll. 3-13; App. 476, l. 6 – 478, l. 7; App. 636, l. 21 – 638, l. 9; App. 658, ll. 5-7; App. 993, l. 24 – 995, l. 24.

Brooks took Lucy back to the store and told Reese what happened. As she took Lucy home, Reese placed telephone calls to her own apartment, her father's apartment, and to Brooks. App. 562, l. 18 – 566, l. 20; App. 926, l. 9 – 927, l. 17; App. 936, l. 14 – 942, l. 10. Meanwhile, Reese's brother, Henry Gray, ran into Mack in the Gonzales Gardens area. After receiving a call on his cell phone, Gray swept Mack's legs out from under him, causing Mack to fall backwards and strike his head on the pavement. Gray then began kicking Mack. App. 276, l. 19 – 284, l. 14; App. 395, l. 22 – 401, l. 22; App. 638, l. 11 – 643, l. 25. Reese eventually came upon Gray and Mack. Reese slipped on the ice when she went to kick Mack but slapped him from where she landed on the ground. She admitted flinging a metal chair but denied that it ever made contact with Mack. App. 282, l. 22 – 283, l. 6; App. 942, l. 13 – 949, l. 14; see also App. 644, l. 14 – 645, l. 18. Other bystanders claimed that Gray and Reese both struck Mack with their hands, feet, and with the metal chair. App. 284, l. 15 – 287, l. 3; App. 348, l. 16 – 356, l. 1; App. 406, l. 18 – 407, l. 13.

Three pathologists testified at trial – Dr. Bradley Marcus for the state, Dr. Adel Shaker for defendant Gray, and Dr. Sandra Conradi for defendant Reese. App. 670; App. 841; App. 906. All of them agreed that the cause of Mack's death was a closed head injury to the brain due to blunt force trauma. App. 705, l. 1 – 710, l. 13; App. 848, ll. 3-7; App. 913, l. 22 – 914, l. 25. Dr. Conradi opined that the fatal injury was caused from falling or being propelled onto a hard

surface, causing the skull to fracture. App. 912, ll. 4-20; App. 914, ll. 2-25; App. 916, l. 24 – 917, l. 6. The state called Dr. Clay Nichols in rebuttal, who agreed that "the timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete, resulting in closed head injury" that caused Mack's death. App. 1010, ll. 4-15; App. 1011, ll. 8-22. By all accounts, Gray had already caused Mack to fall and strike his head on the pavement prior to Reese's arrival at the scene. App. 282, l. 21 – 283, l. 6; App. 404, l. 23 – 405, l. 2; App. 643, ll. 22-25; App. 943, ll. 8-11.

At the post-conviction relief hearing, Reese made several allegations of ineffective assistance of counsel. Amongst others, the specific allegations included that trial counsel rendered deficient performance in failing to request that Reese not be visibly shackled in front of the jury; failing to object to testimony of the prosecution's investigator, Campbell Streeter; and failing to object to testimony of Sergeant William Pegram. Neither these, nor any of the other allegations, were specifically ruled upon in the PCR court's original Order of Dismissal. App. 1353 – 1363. PCR counsel properly filed a motion to amend pursuant to Rule 59(e), SCRCP, but it was denied. App. 1365 – 1366; App. 1370.

Relevant Facts

In Reese's original PCR application, she raised three allegations of ineffective assistance of trial counsel, which included that trial counsel was deficient in failing to provide explanations for the jury strikes following the state's Batson[2] motion; failing to argue a proper basis for the giving of a charge on the lesser offense of voluntary manslaughter; and failing to challenge the prosecution's allegations that Reese placed a telephone call to her co-defendant/brother, Henry Gray, on the day of the incident. App. 1263 – 1264. Without objection, PCR counsel orally

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

amended the application to add the following allegations of ineffective assistance of trial counsel: (1) Failure to move to suppress Applicant's statement as not voluntarily given; (2) Failure to object to impermissible comments during Solicitor's closing argument; (3) Failure to object to Applicant being seen by jury while wearing both ankle and wrist shackles; (4) Failure to properly advise Applicant with regards to her decision to testify; (5) Failure to obtain Applicant's phone records; (6) General failure to prepare; (7) Failure to investigate and speak with state's witnesses; and (8) Failure to object during the testimony of Campbell Streeter and William Pegram. App. 1277, l. 9 – 1278, l. 8; App. 1354.

The PCR court's original Order of Dismissal was divided into four sections – "Procedural History," "Allegations," "Findings of Fact and Conclusions of Law," and "Conclusion." App. 1353 – 1362. The "Findings of Fact and Conclusions of Law" section included sub-sections of "Summary of testimony," "Ineffective Assistance of Counsel," and "All Other Allegations." App. 1358 – 1361. The second section regarding ineffective assistance of counsel included the typical recitation of applicable law, followed by only two paragraphs of reasoning. App. 1361.

PCR counsel filed a timely motion to amend pursuant to Rule 59(e), SCRCP, pointing out the PCR court's failure to specific findings of fact and conclusions of law regarding each of the claims presented at the evidentiary hearing, as required by S.C. CODE ANN. § 17-27-80. App. 1365. The state filed a return to the motion with the following response: "Respondent submits that the Order of Dismissal contains the appropriate findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991)." App. 1367. The PCR court denied the motion to amend in a form order. App. 1370.

Notably, according to the Rule 59(e) motion filed by PCR counsel, the original, deficient Order of Dismissal was served on PCR counsel by U.S. mail on November 16, 2016. App. 1365. The Rule 59(e) motion was filed by PCR counsel on November 30, 2016, more than ten days after service. Id. However, the PCR court did not declare *that* motion untimely.

By contrast, a review of the Form 4 orders which accompanied various filings at the circuit court on remand confirm that the undersigned was not served with the Amended Order of Dismissal by the clerk of court. Prior to the first appeal and remand, the Form 4 order denying PCR counsel's Rule 59(e) motion was signed on April 21, 2017 by the PCR judge and on April 24, 2017 by the clerk of court. App. 1370 - 1371. Unlike the Form 4 which accompanied the Amended Order of Dismissal and the Form 4 accompanying the denial of the undersigned's Rule 59(e) motion post-remand, this one contained the names of counsel. App. 1371; App. 1498 – 1499; Supplemental Appendix 1 – 2. Presumably, the clerk of court serves those attorneys listed on the Form 4 order. The clerk of court did not serve the Amended Order of Dismissal upon the undersigned; it was sent electronically by opposing counsel's office on November 27, 2018. App. 1490 – 1491. The PCR court sent a letter to the South Carolina Supreme Court enclosing a copy of the Amended Order of Dismissal in Petitioner's prior appellate case, but a copy was not sent from either the PCR court or the clerk of court to the undersigned. As a result, November 27, 2018 is the earliest date which the undersigned first received notice of the entry of the order via electronic mail from Respondent's office.

Discussion

The PCR court erred as a matter of law in finding that the undersigned's Rule 59(e) motion was untimely. Rule 59(e) reads: "A motion to alter or amend the judgment shall be served not later than ten days after receipt of written notice of the entry of the order." SCRCP

59(e). The Rule 59(e) motion drafted by the undersigned was served on the tenth day and was therefore timely. App. 1492 – 1497. Trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a motion to alter or amend is filed. Ness v. Eckerd Corp. 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002).

Interpretation of a rule is a question of law reviewed *de novo*. The best evidence of this intent is the words used, and often what the legislature meant is readily revealed by the plain meaning of those words. See Smith v. Tiffany, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017).

Our courts have previously held Rule 59(b) requires **service** of post trial motions within ten days after judgment. Curtis v. Blake, 381 S.C. 189, 192, 672 S.E.2d 576, 578 (2009) (emphasis in original); see also Diamond Jewelers v. Naegele Outdoor Advertising, 290 S.C. 260, 349 S.E.2d 888 (1985) (recognizing post-trial motions to amend, alter and for a new trial must be served not later than ten days after entry of judgment).

The Motion to Alter or Amend was served by the undersigned with knowledge regarding the significance of the ten-day time limitation; it was adhered to by mailing the motion on the tenth day after the Amended Order of Dismissal was received. See Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995).

The subsequent Order Denying Applicant's Motion to Alter or Amend the Amended Order of Dismissal contains an oversight: the Amended Order of Dismissal was not mailed to counsel of record on November 19, 2018, the date it was filed. Supp. App. 1 – 2. As previously noted and as can be seen from the Form 4 which accompanied the Amended Order of Dismissal, there were no names listed in the counsel section on the second page. Id. So while the form indicated that "a copy [was] mailed first class or placed in the appropriate attorney's box on this

19 day of Nov. 2018 to attorneys of record as follows," there were no attorneys of record listed.[3] The undersigned first received the Amended Order of Dismissal electronically from a legal assistant at the South Carolina Attorney General's Office on November 27, 2018. App. 1491. This fact was documented in Petitioner's Motion to Alter or Amend the Amended Order of Dismissal: "Applicant's Counsel received notice of this order on November 27, 2018." App. 1493.

The Order which found the Rule 59(e) motion was untimely appeared to have concluded that because the motion was not *filed* until six days after it was served, it was untimely. App. 1502. However, Rule 59(e), SCRCP, does not mention a *filing* deadline. December 7, 2018 is ten days after November 27, 2018. "In computing any period of time prescribed or allowed by these rules ... the day of the act, event, or default after which the designated period of time begins to run is not to be included." SCRCP 6(a). Our Supreme Court recently repeated that "the ten-day deadline in Rule 59(e) is an absolute deadline." Overland, Inc. v. Nance, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018). Petitioner served the Rule 59(e) motion within the absolute deadline, and it was error by the PCR court to deem it untimely.

Holding that a Motion to Alter or Amend under Rule 59(e) has to be filed within ten days would significantly hinder the practice of attorneys statewide who may not be able to hand-deliver motions for filing at the courthouse. The rule, as written, requires *service* within ten days, and that was done here. The PCR court erred in finding that Petitioner's Motion was untimely. As will be discussed below, this was not the PCR court's only error in Petitioner's case.

---

[3] The undersigned is unaware of any such assigned boxes at any courthouses across the state and has never received filings from a courthouse box.

II. The PCR court erred in finding that Petitioner was not prejudiced by trial counsel's failure to object to Petitioner wearing both wrist and ankle shackles in view of the jury throughout the trial, where Petitioner was shackled the entire duration of trial, including the time when Petitioner walked to and from the witness stand in full view of the jury.

Relevant Facts

During co-defendant counsel's opening argument, he made reference to the fact that his client was "sitting here at the defense table with shackles on his feet." App. 166, ll. 9-13; see also App. 163, ll. 4-6. Unlike her co-defendant, Petitioner Reese was released on bond following her arrest. However, arrangements were not made with her bondsman so that she could remain on bond during the trial. Reese was taken into custody at the lunch break after the jury was sworn in on the morning of February 29, 2012. App. 171, l. 21 – 172, l. 19; App. 334, l. 11 – 335, l. 21. As a result, the jurors, who originally saw Reese unbound during jury selection, preliminary instructions, and opening statements, returned to court on the afternoon of February 29, 2012 to observe her shackled.

At the PCR hearing, both Reese and trial counsel testified that Reese wore plain clothes but remained shackled at both her wrists and ankles once taken into custody on the 29th and for the remainder of her trial. App. 1297, ll. 7-24; App. 1301, ll. 13-20; App. 1305, l. 24 – 1306, l. 5; App. 1311, l. 21 – 1313, l. 20. Both further agreed that when Reese took the stand to testify she walked in front of the jury from the defense table to the witness box in her ankle and wrist shackles. App. 1297, ll. 7-24; App. 1301, ll. 18-20; App. 1322, l. 10 – 1323, l. 1; see App. 933, ll. 11-23 (reflecting that no break was taken before Reese took the stand). Trial counsel Farley claimed that the reason that he failed to object to Reese wearing shackles visible to the jury was because he did not want to challenge a previous ruling made by the trial judge. App. 1332, ll.

16-21. Inexplicably, Farley testified: "It was my understanding that that was the protocol that they could have on civilian clothes, but they were going to be shackled while they were in custody." App. 1334, ll. 2-17. Farley seemed to equate the requirement that Reese be taken into custody during court breaks and overnight as a requirement that she be shackled in the courtroom. App. 1312, ll. 15-25; App. 1322, l. 25 – 1323, l. 1.

When questioned as to why he failed to object to co-defendant's counsel mentioning the shackles, trial counsel suggested that he "was more focused on [his] own opening statement in defending Ms. Reese, and that may have gone by and [he] didn't pay that much attention to it in preparing [his] own case for her." App. 1313 ll. 8 – 20. However, as pointed out by PCR counsel, *trial counsel had already given his opening* at the time that counsel Chaplin remarked about the shackles. App. 163 ll. 4 – 7; App. 166 ll. 9 – 13. Therefore, no evidence exists to support trial counsel's rationale for failing to object to those remarks.

The Amended Order of Dismissal found that "there [was] no evidence that the shackles were visible to jurors at any other time" than when Petitioner walked to the witness stand to testify. App. 1480. This conclusion assumes that Petitioner never rested her hands on the table and that there was a tablecloth covering the table such that Petitioner's legs and ankles were not visible to the jury. The PCR court noted that "Applicant testified that her ankles and wrists were shackled for the duration of the trial" but omitted the fact that trial counsel confirmed that fact. Id.; App. 1313 ll. 5 – 7. Additionally, the PCR court failed to account for the realization that the jury was already aware of the shackles, having heard about them from counsel Chaplin. As a result, the PCR court found that "[w]hile Trial Counsel erred in his failure to object, an objection was unlikely to affect the outcome of the trial; and the error was harmless beyond a reasonable doubt." Id. For the reasons below, Petitioner respectfully contends that this is an error.

Right to Effective Assistance of Counsel

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether 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.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). "Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Discussion

The evidence before the PCR court was consistent that Reese was shackled at both her wrists and ankles from the afternoon of February 29, 2012 through the end of the trial on March 2, 2012. Further, she walked from the defense table to the witness box in front of the jury wearing those shackles. App. 1297, ll. 7-24; App. 1301, ll. 18-20; App. 1305, l. 24 – 1306, l. 5; App. 1312, l. 8 – 1313, l. 7. Counsel articulated no strategic reason for failing to request that

she be unshackled or that the shackles not be visible to the jury. Rather, he claimed that the shackling of a defendant during their trial was "protocol" for all offenders who were in custody during trial. App. 1334, ll. 2-17. As will be discussed more fully *infra*, to the extent that such a "protocol" existed, it is in direct contravention to the United States Supreme Court's ruling in Deck v. Missouri, 544 U.S. 622 (2005). What appears more likely is that trial counsel misunderstood the trial court's ruling and failed to protect Reese's rights by raising no objection to her visible shackling.

In Illinois v. Allen, 397 U.S. 337 (1970), the United States Supreme Court examined the right of a criminal defendant to be present throughout his trial. The Court recognized the need to balance the defendant's right to be present with the need to maintain dignity, order and decorum in the courtrooms. Id. at 343-344. Although the Court recognized that in some situations, binding and gagging a defendant may be the fairest and most reasonable way to handle some disruptive defendants, the Court explained "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort." Id. at 344. The Court explained that the sight of the shackles and gags would likely have a significant effect on the jury's feelings about the defendant and the use of the restraints represented "an affront to the very dignity and decorum of judicial proceedings." Id. Further, a defendant's ability to communicate with counsel is greatly reduced when a defendant is restrained. Id.

In State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995), a capital direct appeal, the appellant argued that his shackling throughout his trial violated his due process and equal protection rights and prejudiced him in both the guilt and sentencing phases. The South Carolina Supreme Court noted that "[w]hether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the

considerations of courtroom decorum and security." 320 S.C. at 209, 464 S.E.2d at 107 (citing Illinois v. Allen, 397 U.S. 337 (1970)). Our Court aptly noted that "[t]he trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes." Id. Tucker had two previous convictions for escape and at least one conviction for attempted escape. Id. He had also fled the state following and resisted his arrest, assaulting the officers. Id. Additionally, the trial judge ensured that Tucker's shackles were not visible to the jury and provided a curative instruction to the jury to explain Tucker's failure to stand when the judge entered and exited the courtroom. Id. Thus, the Court found: "Balancing the effect of the restraints and the need for security, the trial judge did not err in restraining appellant based upon appellant's prior history of escapes and his resistance to arrest." Id. at 209-10, 464 S.E.2d at 107.

In Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), the issue before the South Carolina Supreme Court was whether trial counsel was deficient in permitting the defendant to proceed to trial in the prison jumpsuit. Though Humbert was also shackled and wearing a prison identification bracelet during his trial, only the jumpsuit issue was preserved for appellate review. 345 S.C. at 337, 548 S.E.2d at 865. The Court determined that there was evidence to support the PCR court's finding that trial counsel was deficient in allowing the defendant to proceed to trial dressed in prison clothing. Id. The Court explained "it [is] generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing." Id. In a footnote, the Court explained that a defendant's appearance at trial dressed in jail clothing is not automatically reversible error because there may be situations where counsel determines the jail attire benefits the defense as a matter of trial strategy. Id. at 338 n.4, 548 S.E.2d at 865 n.4. The Court went on to

hold that there was evidence to support the PCR court's finding that Humbert was not prejudiced by trial counsel's deficient performance concerning the prison clothing based upon the "overwhelming evidence" against him. Id. at 338, 548 S.E.2d at 865-866.

More recently, in Deck v. Missouri, 544 U.S. 622, 626 (2005), the United States Supreme Court explained "the law has long forbidden the routine use of visible shackles during the guilt phase" of a criminal trial. Rather, the law "permits a State to shackle a criminal defendant ***only*** in the presence of a special need." 544 U.S. at 626 (emphasis added). The Court noted the long history of cases which have held that it is only in "extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal" imperatively demand them that restraints will be tolerated. Id. at 626-27.

The Deck Court explained that "a basic element of the 'due process of law' protected by . . . Fifth and Fourteenth Amendments to the Constitution prohibit[s] the use of physical restraints visible to the jury absent a trial court determination . . . that [the restraints] are justified by a state interest specific to a particular trial." 544 U.S. at 629. The purpose of this prohibition is to give effect to three fundamental legal principles. First, the criminal justice system presumes a defendant is innocent until proven guilty. Id. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." Id. Second, physical restraints may interfere with a defendant's ability to communicate with his counsel and participate in his own defense. Id. at 631. Third, the use of shackles undermines the dignity and decorum of judicial proceedings, "which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." Id. Thus, the Deck Court held: "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a

trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." Id. The Deck Court also cited Holbrook v. Flynn, wherein the United States Supreme Court referred to visible shackling of criminal defends as "inherently prejudicial." 475 U.S. 560, 568-69, 106 S.Ct. 1340, 1345-46 (1986).

This Court examined Deck extensively in a recent opinion. State v. Heyward, 432 S.C. 296, 852 S.E.2d 452 (Ct. App. 2020) (rehearing denied January 15, 2021). In that direct appeal case, this Court concluded "the trial court abused its discretion in denying Heyward's request to remove his shackles during jury selection." Id. at 324-25, 432 S.E.2d at 466. This Court determined the error to be harmless because "nothing in the record indicates that any of the jurors who were selected for Heyward's trial could or did see his shackles." Id. at 327, 852 S.E.2d at 468. Further, this Court noted "Heyward was only shackled during the jury selection and he was not shackled during trial." Id. Petitioner's case is easily distinguished in this regard.

The issue before this Court now is whether trial counsel's failure to object to Petitioner Reese wearing wrist and ankle shackles that were visible to the jury prejudiced her right to a fair trial. Farley seemed to contend that when Judge Cooper ruled that Reese would be taken into custody rather than remain on bond for trial, there was some implicit ruling that she would be shackled for trial. He said that "when the -- Judge Cooper made the ruling that they would be in custody, then they would be shackled. So it wasn't my preference." App. 1312, l. 14 – 1313, l. 7. When asked why Farley did not object to Reese walking across the courtroom to testify while shackled, Farley said, "I mean, when the judge took them into custody, that was his ruling." App. 1322, l. 10 – 1323, l. 1. Under cross-examination by the state, Farley agreed with the

suggestion that his failure to object was because he "didn't want to challenge a previous ruling made by the judge." App. 1332, ll. 16-21. On re-direct he further alleged that it was his "understanding that it was protocol" that defendants in custody could wear civilian clothes "but they were going to be shackled while they were in custody." App. 1334, ll. 2-13.

In order to rule on deficiency, the PCR court was required to analyze whether trial counsel's "understanding" and failure to object on the record to visible shackling fell below an objective standard of reasonableness. See Strickland, 466 U.S. 668. The sincerity of trial counsel's unfounded and misguided explanations do not make them reasonable. The law discussed *supra* provides that there is a constitutional presumption against visible shackling of defendants during the guilt phase of a criminal trial. Deck, 544 U.S. at 626, 628. In fact, Deck prohibits the routine use of visible shackles, such as the "protocol" alleged to exist by trial counsel Farley. See id. at 626. A defendant's right to remain free from visible shackles "may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." Id. at 628.

As noted in Petitioner's Motion to Alter or Amend, the PCR court's reliance on the Clyde case was misplaced. People v. Clyde, 18 N.Y.3d 145, 961 N.E.2d 634 (2011). The state never contended, and much less proved beyond a reasonable doubt, that a shackling error did not contribute to the verdict obtained. Furthermore, the Supreme Court of New York has declined to extend the holding which the PCR court sought to rely on. See People v. Flores, 62 N.Y.S.3d 68, 153 A.D.3d 182 (2017) ("The error here relates not to evidence, argument, or instruction that was improperly presented to, or improperly precluded from, the jury during trial, but to the message the court sent to the prospective jurors about the defendants before any evidence was presented, argument was made, or instruction was given. There is no way of knowing what

causal effect this particular error, which impacted on the presumption of innocence, might have had on the verdicts.").

Here, trial counsel failed to protect Reese's constitutional rights when he made no request that she be unrestrained during trial or that any necessary restraints not be visible to the jury. Had such a request been made, the record provides no evidence that any shackling was necessary with respect to Reese. Reese was released on bond soon after turning herself in on February 19, 2010. App. 1279, ll. 17-25. She was not taken into custody until after the jury was sworn on February 29, 2012. That was not the result of any wrongdoing on her part, but rather her attorney's failure to ensure that the bondsman provided the necessary documentation to reflect his intention to continue on the bond during the trial. App. 171, l. 21 – 172, l. 19; App. 334, l. 11 – 335, l. 21. Reese had no prior criminal convictions, with only an assault arrest showing on the rap sheet run by the prosecution. App. 1167, ll. 20-24. Further, there is nothing in the record to indicate that Reese acted unruly or disruptive at any point during the trial so as justify a departure from the constitutional presumption against shackling. Under the facts of this case, trial counsel's acquiescence in Reese appearing before the jury in visible physical restraints was deficient performance.

Trial counsel's deficient performance prejudiced Reese because the use of wrist and ankle shackles conveys to the jury that a person is dangerous and violent. Further, in this case, the jurors saw Reese without any restraints during the voir dire, two rounds of jury selection and opening statements. When the jurors returned from lunch on February 29, Reese was inexplicably subject to harsh visible restraints. With conflicting testimony from both the lay witnesses and experts, credibility was of outmost importance in the trial. Further, Reese testified on her own behalf at the trial. Notably, she walked to the witness stand in front of the jury wearing both wrist and ankle

shackles. The use of physical restraints limited Reese's ability to express herself on the witness stand and undermined the presumption of innocence. See Deck, 544 U.S. at 630 ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process."). As a result, there was no possible conclusion for the PCR court to reach other than that Reese was deprived of her constitutional right to the effective assistance of counsel.

III. The PCR Court erred in finding that trial counsel rendered effective assistance of counsel where he failed to object to Sergeant William Pegram's testimony that "in my opinion of the law, everybody involved in this case was guilty but I had to determine the principal parties in the case," which invaded the province of the judge and jury.

Relevant Facts

Sergeant William Pegram served as the lead investigator on the case from the Columbia Police Department. App. 757, ll. 1-4. Pegram testified that as a result of his investigation he interviewed Angelo "Ricky" Boyd. When asked by the prosecutor why Boyd was not charged with any crime following his statement, Pegram responded: "Because I was still trying to determine what we had and who the principal party was in the case. By law -- in my opinion of the law, everybody involved in this case was guilty but I had to determine the principal parties in the case." App. 776, l. 16 – 777, l. 6. Reese's trial attorney offered no objection. At the PCR hearing, trial counsel reviewed the relevant portion of the transcript and said: "Reading it now, it probably is an objection and I may have -- in the length of the trial, I may have just missed that objection." App. 1315, l. 16 – 1316, l. 3.

The PCR court found "Trial Counsel was not deficient in his failure to object to Sgt. Pegram's testimony" because "it is axiomatic that police officers believe in the guilt of persons

who they arrest." App. 1486. This conclusion neglects the simple fact that Pegram testified to his opinion of guilt without objection. There is no evidence to support a ruling that trial counsel rendered effective assistance where he failed to object to a law enforcement officer's testimony that everyone involved, which would have included Reese and her co-defendant, were guilty under the law.

Discussion

Pegram improperly invaded the province of the judge and jury when he testified that it was his opinion that under the law "everybody involved in this case was guilty". See App. 776, l. 16 – 777, l. 6. Because Pegram testified as a lay witness, any opinion testimony he gave was controlled by Rule 701, SCRE, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

"The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Our Supreme Court made clear that it is "the longstanding rule of law that no one may invade the province of the jury." Briggs v. State, 421 S.C. 316, 328, 806 S.E.2d 713, 719 (2017); Rosamond v. Lucas-Kidd Motor Co., 182 S.C. 331, 189 S.E. 641, 647 (1937) ("The Constitution has made the jurors the sole judges of the facts as testified in a case. The judge is forbidden to even intimate the opinion he may have of the truth or falsity of the testimony."). Thus, the content of Pegram's testimony was no less improper because he was the lead case agent. Further, it was the trial judge's responsibility to charge the jury on the law. See App. 136, ll. 1-3; App. 1133, l. 21 – 1134, l. 4.

In State v. Brewer, the South Carolina Supreme Court relied on a North Carolina case for the notion that:

> [T]he questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court.

411 S.C. 401, 308, 768 S.E.2d 656, 659 (2015) (citing State v. Miller, 197 N.C. App. 78, 676 S.E.2d 546, 556 (2009) (noting "the wholesale publication of a recording of a police interview to the jury, especially law enforcement's *investigatory* questions, might very well violate the proscriptions against admitting hearsay or Rule 403" and cautioning trial courts to be vigilant in redacting and excluding problematic portions of law enforcement's investigatory questions (emphasis in Brewer)).

Similar concerns exist in the matter at bar. A law enforcement witness advised the jury of his thoughts on guilt, thereby invading the jury's exclusive province. Our Supreme Court explained in Brewer how improper it was for a law enforcement witness to suggest that a defendant "prove his innocence" before a jury:

> 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 nauseum* 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 person is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt.

Brewer at 408, 768 S.E.2d 659-60.

The error in Brewer is not identical to Pegram's improper remark, but the rationale as to why both of the comments are improper is comparable. Much like an expert witness whose testimony can be afforded additional significance, this was a police officer who is entrusted with

additional credibility. Here, the jury knew this was the state's witness. The purpose of his testimony was to try to prove guilt.

In State v. King, our Supreme Court modified this Court's opinion in a case involving similar facts. 422 S.C. 47, 810 S.E.2d 18 (2017). In that case, Officer Butler testified over defense counsel's objection that she spoke with two people during an investigation and learned that there were "[a]pproximately three or four shots" fired in a case involving the charges of attempted murder, armed robbery, and a weapons charge. Id. at 52, 810 S.E.2d at 20-21. The South Carolina Supreme Court undertook a hearsay analysis. Id. at 66, 810 S.E.2d 28. The Supreme Court agreed with this Court's analysis: "Officer Butler's testimony was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot." Id. As in Brewer, the Court cautioned prosecutors "against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." Id. at 66-67, 810 S.E.2d at 28.

In Petitioner's case, the state weaponized this improper testimony, thus bolstering the prejudicial effect. During closing argument, the solicitor indicated that her office agreed with Pegram's conclusions:

> But when [the police] got it straight, they charged the right people. Yes, it took eighteen months. We don't want to get it wrong. Do you really want a solicitor's office that runs around just charging people because we feel like it or do you want us to do our jobs? Do you want Investigator Pegram and the other investigators to do their jobs to, do them right, do what you pay us to do - - and we did? We charged the right people with the right crime because that's who did it.

App. 1124 ll. 1 – 11.

The solicitor's words contain a meaningful characterization of Pegram's testimony. At the start of the third sentence, the solicitor shifted from third person to first person. Accordingly, Pegram's conclusions were wrapped up into the solicitor's own beliefs. The impropriety was

therefore compounded, as the solicitor marched, armed with the testimony of a law enforcement officer, into the exclusive province of the jury: credibility determinations.

A jury must make its own assessment on the credibility of witnesses. Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002). Generally, a witness is not allowed to testify that another witness is telling the truth. State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145 (1988); Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998).

Pegram's testimony in Petitioner's case was the result of his investigation and conversations with out-of-court witnesses. Following those undertakings, Petitioner was arrested and tried. Trial counsel was deficient in failing to object to Pegram's testimony and he admitted that his failure to object was a mistake. App. 1315, l. 16 – 1316, l. 3. In this case, where testimony of the lay and expert witnesses varied wildly, there is a reasonable probability that Pegram's testimony affected the outcome of the trial.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse her convictions and remand for a new trial.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January 2022.