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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

JOEY CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001627

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Allowing the admission of hearsay statements of five jailhouse snitches claiming that Petitioner confessed to killing the deceased was not a reasonable valid trial strategy as a preemptive disclosure.

Trial counsel was ineffective in cross-examining a detective about statements by five jailhouse snitches and not objecting when the State, on re-direct, asked the detective to read the entire statements to the jury and then introduced the written statements in evidence. Trial counsel's questioning of the detective introduced otherwise inadmissible inculpatory statements of jailhouse snitches without subjecting the snitches to confrontation and cross-examination to raise bias and challenge their reliability and credibility. This was not a valid or reasonable trial strategy. Instead, the actions of trial counsel diluted the State's burden of proof and deprived Petitioner the right to confront and cross-examine witnesses. Petitioner was prejudiced by the deficient performance of trial counsel.

Respondent argues that trial counsel's strategy was to "draw the sting" from the incriminating statements from the jailhouse snitches by allowing their admission from the hearsay testimony of the detective. (BOR p. 23). Respondent cites State v. Campbell, 629 S.E.2d 345 (N.C. Ct. App. 2006), and L. Timothy Perrin, Pricking Boils, Preserving Error: On the Horns of A Dilemma After Ohler v. United States, 34 U.C. Davis L. Rev. 615 (2001), in support of a "draw the sting," preemptive disclosure trial strategy. Respondent misconstrues the preemptive disclosure, "draw the sting" trial strategy discussed in Campbell and the law review article.

The law review article discusses the Ohler case and situations where trial counsel chooses to address weaknesses on direct examination so as to minimize the impact on cross-examination. In Ohler v. United States, 529 U.S. 753 (2000), the United States Supreme Court held that a criminal defendant's disclosure of a prior criminal conviction during her direct examination waived

that defendant's right to appeal the trial court's in limine ruling that the prior conviction was admissible.

The law review article discusses different types of preemptive disclosures writing:

Preemptive disclosure can take many forms. The most common disclosure that finds its way into appellate opinions is a criminal defendant's disclosure of a prior conviction. But that is far from the only kind of weaknesses disclosed by litigants. The list of possible disclosures extends to any kind of impeaching point, including a witness's alleged bias, interest, or prior inconsistent statement. It might also include preemptive explanations of aspects of the witness's testimony that might seem farfetched or unbelievable or past nonconviction misconduct of the witness.

L. Timothy Perrin, Pricking Boils, Preserving Error: On the Horns of A Dilemma After Ohler v. United States, 34 U.C. Davis L. Rev. 615, 626 (2001)(footnotes omitted). The types of preemptive disclosures discussed in the article involve impeachment evidence brought out on direct examination so as to minimize the effect on cross-examination. In contrast, the questioning in the present case did not involve a preemptive disclosure of impeachment evidence on direct examination. Instead, trial counsel questioned the detective about hearsay statements made by the jailhouse snitches while cross-examining the detective. The detective then, on re-direct, read the statements to the jury, without objection, and the statements were admitted in evidence, without objection.

In State v. Campbell, 629 S.E.2d 345 (N.C. Ct. App. 2006), the defense strategy was to argue that Campbell was not guilty of first degree murder but was instead guilty of a lesser offense involving a less culpable mental state than premeditation and deliberation. Campbell repeatedly lied and told many people, including his lawyers, that the deceased strangled herself. As part of the defense strategy to argue for a lesser offense with less culpable mental state, trial counsel informed the jury that Campbell lied to his attorneys. The North Carolina Appellate Court found that trial counsel was not deficient in telling the jury Campbell lied writing:

Since defense counsel knew defendant's lies would be an issue at trial, counsel attempted to turn defendant's lies into a favorable fact. Defense counsel was seeking to have defendant acquitted of first degree murder, and instead have defendant found guilty of a lesser-included crime such as second degree murder or voluntary manslaughter. Their hope of doing so relied on showing defendant had a less culpable mental state than premeditation or deliberation, a strategy apparent as early as defendant's 19 May 2003 declaration before trial admitting he had killed Domenie. Hence, defense counsel argued that if defendant had premeditated or deliberated Domenie's murder, he would have produced a more credible alibi than the "pathetic" one he continually provided. As counsel summarized in closing argument, "If it had been premeditated, don't you know the story would have been better?"

Campbell, 177 N.C. App. at 527, 629 S.E.2d at 350. Importantly, Campbell took the stand and, first during direct and then also during cross, admitted that he lied to his attorneys. The North Carolina Appellate Court wrote, "In our 'highly deferential' review of defense counsel's conduct in this case, Strickland, 466 U.S. at 689–90, 104 S.Ct. at 2065–66, 80 L.Ed.2d at 694–95, we view counsel's decision to address defendant's repeated lies as a prudent step in pulling the sting from damaging evidence." Campbell, 177 N.C. App. at 527, 629 S.E.2d at 349–50.

In the present case, under the deferential standard of review, trial counsel was not pulling the sting from damaging evidence the State would introduce on cross-examination. Instead, during the cross-examination of the detective, a State's witness, trial counsel asked about hearsay statements made by the jailhouse snitches. Then, on re-direct, the State, without objection, admitted the otherwise inadmissible hearsay statements without subjecting the snitches to confrontation and cross-examination to raise bias and challenge their reliability and credibility. While trial counsel knew the statements by the jailhouse stitches would be an issue at trial, like the lies in Campbell, it was not a reasonable or valid trial strategy to allow the statements to be admitted by the hearsay testimony of the detective. Trial counsel failed to put the State to its burden of calling the jailhouse snitches to testify about the purported incriminating statements.

The admission of the hearsay statements from the snitches during the questioning of the detective did not prohibit the State from calling the snitches as witnesses at trial, trial counsel's purported trial strategy. The State could have called the jailhouse snitches as witnesses at trial. The reason the prosecution chose not to call the snitches was because their incriminating statements were already in evidence, as a result of trial counsel's cross-examination of the detective, and it was in the State's best interest not to subject the snitches to cross-examination. While trial counsel was able to point out inconsistencies in the hearsay statements, this is no substitute for the traditional role of cross-examination. As noted by the prosecutor at the PCR hearing, (App. p. 1142, lines 11-20), if the jailhouse snitches had taken the stand and testified, as should have been required, trial counsel would have had the opportunity to confront the witnesses and cross-examine about the inconsistencies.

Respondent argues that, "Petitioner's sole complaint is that Counsel should have instead waited for the State to run him over with each of the informants in turn, and attempted to impeach each of them in turn without truly know ahead of time the substance of their testimony." (BOR pp. 23-24). While counsel may not have known the full substance of the snitch's testimony, trial counsel could have impeached the snitches with their written statements if their testimony at trial differed. Counsel should have required the State to meet its burden of proof by calling the snitches as witnesses at trial where they could be cross-examined.

Trial counsel's purported "trial strategy" was not objectively reasonable under prevailing professional norms. Addressing the deferential standard in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984), the United States Supreme Court wrote:

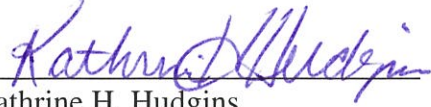
Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are

alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Trial counsel's purported defense strategy failed to make the adversarial testing process work with regard to the alleged damaging statements made by the five jailhouse snitches. Trial counsel's ability to cross examine the investigator about inconsistencies in the jailhouse snitch statements is not a substitute for requiring the State to call these witnesses to testify at trial where they would be subject to cross examination. No lawyer of ordinary training and skill in criminal law would consider the purported strategy in the present case a competent strategy. This was not a strategic decision of preemptive disclosure during direct examination in an effort to reduce prejudice from cross-examination. Instead, the actions of trial counsel diluted the State's burden of proof and deprived Petitioner the right to confront and cross-examine witnesses. Petitioner was prejudiced by the deficient performance of trial counsel. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and remand for a new trial.


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This 22nd day of March, 2022.