

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

VICTOR D. SMITH,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000549

PETITION FOR WRIT OF CERTIORARI

ADAM SINCLAIR RUFFIN
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

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ISSUES PRESENTED

1.

Did the PCR judge err in finding that counsel was not ineffective for failing to object to the lead investigator, Travis Holdorf's, opinion that he believed that one of Petitioner's co-defendants was being truthful when he implicated Petitioner in the murder since this was improper opinion testimony from a law enforcement officer?

2.

Did the PCR judge err in finding that counsel was not ineffective for failing to object to testimony that Petitioner was in prison in Mississippi serving a sentence for a charge that was not disclosed to the jury where such testimony was bad character evidence and wholly unnecessary to establish Petitioner's alibi defense?

3.

Did the PCR judge err in finding that counsel was not ineffective for failing to properly object to the introduction of the death certificate of decedent where counsel argued in closing there was no proof the remains were the alleged victim's, yet did not object on Rule 403, SCRE grounds and did not make a contemporaneous objection when the state introduced the death certificate?

4.

Did the PCR judge erred in finding that counsel was not ineffective in failing to object to the opinion testimony of Deputy Coroner Bill Stevens regarding wind and air currents preventing the smell of the decomposing body from traveling in the direction of the apartment complex in an attempt to explain why there were no reports of smelling a dead body where Stevens was never qualified as an expert in this field and one of counsel's major themes throughout his questioning of witnesses and his closing argument was that the murder took place at a later date than alleged by the state which was supported by the fact that nobody reported smelling the body.

STATEMENT

Petitioner was indicted in February 2010 by the Richland County grand jury for murder. App. 957 – 958. On September 19, 2011, Petitioner proceeded to trial before the Honorable Casey L. Manning and a jury. App. 1. Petitioner was represented by Christopher Hart and the state was represented by Daniel Goldberg and Carter Potts. App. 1.

Petitioner, along with three co-defendants, was accused of murdering Ernest Robinson. Robinson did not show up for work on September 28, 2008 or any day after that. A missing persons investigation was conducted by Dorothy Cronise with the Richland County Sherriff's Department. App. 158, l. 1 – 159, l. 20. She was assigned the case on December 29, 2008 and began her investigation by interviewing people at Robinson's place of employment, a restaurant called Beef O'Brady's. App. 162, l. 3 – 163, l. 5.

The owner of Beef O'Brady's, Mark Wickham, testified that Petitioner and Robinson both worked for him at his restaurant. App. 176, l. 8 – 177, l. 4; 178, ll. 17 – 21. Wickman said that Robinson worked on September 27, 2008 until about 10:00 p.m. but did not show up for work the following morning as scheduled. App. 177, l. 21 – 178, l. 16. According to Wickman, Petitioner showed up for work on September 28, but only stayed for about an hour and then "he just kind of disappeared." App. 178, l. 17 – 179, l. 8. The next time Wickman saw Petitioner was when he came to pick up his final paycheck the following Friday. App. 179, ll. 9 – 13. Wickman never saw Robinson again. App. 179, ll. 14 – 19.

On July 20, 2009, a surveyor found a human body wrapped and tied up with a belt in the retention pond area of the apartment complex where Petitioner had previously resided. App. 120, l. 1 – 123, l. 6. Dr. Clay Nichols performed an autopsy on the body that was recovered but was unable to make a positive identification on it. Dr. Nichols admitted that, at the time of the

trial, he did not know who the remains belonged to. App. 276, l. 9 – 277, l. 24; app. 283, ll. 11 – 18.

Marvin Shipman, a friend of Robinson's, testified that he last saw Robinson on September 27, 2008. App. 203, ll. 5 – 15. Shipman said that he picked up Robinson and a man named Allen¹ from Northstone Apartments to "hang out." App. 203, l. 17 – 204, l. 11. He recalled that they went to buy some marijuana and Robinson and Allen split a twenty-dollar bag. App. 204, ll. 15 – 24. Shipman then dropped Robinson off at work and took Allen back to the apartment complex. App. 205, ll. 12 – 15. Shipman claimed that when he dropped Robinson off at work, Robinson told Allen to hold the weed they had purchased, and that Robinson would come to Allen's house after he got off work to smoke it. App. 206, ll. 3 – 12.

Allen Fulton, who was also arrested for the murder of Robinson, testified against Petitioner at his trial. App. 474. Fulton claimed that Robinson was planning to come over to Petitioner's house after he got off work on September 27 to finish smoking the marijuana that they had purchased earlier in the day when they were with Shipman. App. 478, ll. 12 – 19. Fulton said that when Shipman dropped him off at Petitioner's house, Petitioner, Jeremiah, Darius and Jazmine were all present in the apartment.² App. 479, ll. 3 – 7.

Fulton claimed that Petitioner accused Robinson of stealing his rent money and that he was planning to beat Robinson up that night when Robinson came to Petitioner's house. App. 479, l. 8 – 481, l. 25. After Robinson arrived at Petitioner's apartment that night, Fulton said that he punched Robinson and then Petitioner, Jeremiah and Darius joined in attacking Robinson.

¹ As will be seen later, this was Allen Fulton, one of Petitioner's co-defendants.

² Jeremiah Jones and Darius Smith, who was Petitioner's brother, were also both arrested for the murder of Robinson. Jazmine Bright was Petitioner's girlfriend at the time and she was not charged as a co-defendant.

App. 483, l. 12 – 485, l. 3. Fulton then claimed that after they all finished physically assaulting Robinson, Petitioner shot Robinson in the head one time with a pistol. App. 485, l. 4 – 488, l. 6. According to Fulton, after Petitioner shot Robinson, they wrapped his body in a shower curtain and dumped him in the woods behind the apartment. App. 489, l. 22 – 490, l. 14. After disposing of Robinson’s body, Fulton said that he and Jeremiah spent the rest of the night working to clean up the apartment. App. 490, l. 15 – 492, l. 5.

The jury convicted Petitioner as charged and the judge sentenced him to life imprisonment. App. 959.

On direct appeal, Petitioner was represented by Kathrine Hudgins of Appellate Defense. App. 815 – 826. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) and the Court of Appeals dismissed the appeal pursuant to the Anders procedure. State v. Smith, No. 2013-UP-423 (filed November 20, 2013).

Petitioner filed his PCR application on July 9, 2014 and the state filed its Return on July 23, 2015. App. 829 – 840. An evidentiary hearing was held on December 11, 2015 before the Honorable G. Thomas Cooper. App. 841. Petitioner was represented by Jonathan Waller and the state was represented by J. Clayton Mitchell, III. App. 841. Petitioner and his trial counsel, Christopher Hart, were the only witnesses who testified at the hearing. App. 842. The PCR judge denied Petitioner’s application for relief. App. 942.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR judge erred in finding that counsel was not ineffective for failing to object to the lead investigator, Travis Holdorf's, opinion that he believed that one of Petitioner's co-defendants was being truthful when he implicated Petitioner in the murder since this was improper opinion testimony from a law enforcement officer.

Relevant Facts

The most significant evidence against Petitioner presented at his trial was the testimony of his two co-defendants, Allen Fulton and Jeremiah Jones. Jones testified that he and Petitioner were "like brothers," and that he did not want to get Petitioner in trouble so he did not tell law enforcement the truth when he was first interviewed regarding the alleged murder of Robinson. App. 442, l. 13 – 443, l. 3. Jones then changed his story and claimed that he was present at Petitioner's house on the night of September 27, 2008 and witnessed Petitioner murder Robinson. App. App. 443, l. 8 – 449, l. 25. Jones further claimed that after the murder, Petitioner instructed him to dispose of Robinson's body and to clean up the blood in the apartment. App. 450, l. 5 – 452, l. 19.

Travis Holdorf, who was the lead investigator on this case, testified that he interviewed Jones regarding the alleged murder of Robinson. Holdorf testified:

He did not want to implicate [Petitioner], that [Petitioner] was like a brother to him. He was emotional. *I think it was very real what he was saying, because, again, it was emotional. There are just some things you get a feeling they're not faking.* He didn't want to tell, but he didn't have a choice. He even implicates himself in the murder.

App. 692, ll. 11 – 23 (emphasis added). When trial counsel was asked what the trial strategy was in not objecting to this testimony by Holdorf, he only said: “Sitting here today, I can’t tell you that.” App. 905, ll. 1 – 5.

Discussion

Jones’ credibility as a witness was critical to the jury’s determination of whether the state met its burden of proof. Counsel’s failure to object to the lead investigator’s testimony vouching for the credibility of one of Petitioner’s co-defendants constituted deficient performance. The reason that counsel could not articulate a strategic reason for such a failure was because there was no strategic reason not to object to this opinion testimony by the lead investigator that he believed a key state’s witness was telling the truth.

In Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016), this Court found that trial counsel was ineffective for failing to object to the solicitor’s improper comments during closing argument. In Tappeiner, the assistant solicitor suggested that the police and the rape crisis counselor believed the alleged victim and did not believe the defendant. Id. at 246, 785 S.E.2d at 474-475. This Court found Tappeiner was prejudiced by her trial counsel’s failure to object to these comments because the case turned solely on the credibility of the witnesses since there was no physical evidence of the defendant’s guilt.

Similarly, in Briggs v. State, 421 S.C. 316, 327, 806 S.E.2d 713, 719 (2017), this Court found that trial counsel was ineffective, in part, for his failure to object to a forensic interviewer testifying that it was her job to determine whether the alleged minor victim knew the difference between the truth and a lie. The Briggs Court, in interpreting Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), said that “a witness may not give an opinion for the purpose of conveying to the jury – directly or indirectly – that she believes the victim.” Briggs, 421 S.C. at 324, 806

S.E.2d at 717. See also Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (holding that trial counsel's failure to object to forensic interviewer's testimony that she believed the minor victim constituted ineffective assistance of counsel where counsel gave no strategic reason for the failure to object, the credibility of the victim was central to the case, and there was not overwhelming evidence of guilt).

Again, in this case, the improper bolstering came from the lead investigator and he was bolstering the testimony of a testifying co-defendant. Because the co-defendants were the only eye witnesses to the alleged crime, their credibility was crucial. Their credibility was also the sole province of the jury to determine. Instead of allowing the jury to determine credibility based on what the witnesses testified to, trial counsel's failure to object to Holdorf's testimony allowed the jury to hear the lead investigator directly comment on his belief that the co-defendant was telling the truth when he implicated Petitioner in the murder. The PCR judge erred in finding that trial counsel's failure to object was not ineffective assistance of counsel. See Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017); Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016).

The PCR judge erred in finding that counsel was not ineffective for failing to object to testimony that Petitioner was in prison in Mississippi serving a sentence for a charge that was not disclosed to the jury because such testimony was bad character evidence and wholly unnecessary to establish Petitioner's alibi defense.

Relevant Facts

The state's theory of the case was that Robinson was murdered by Petitioner and his co-defendants on September 27, 2008.³ On October 21, 2008, law enforcement responded to Petitioner's apartment, the alleged location of the murder, on a tip that narcotics activity was taking place. App. 627, ll. 10 – 18. Law enforcement entered Petitioner's residence and found "butts from [marijuana] being smoked in the first room" and arrested Petitioner and his girlfriend Jazmine for simple possession of marijuana. App. 627, l. 19 – 628, l. 16.

When Petitioner was taken to jail for the simple possession of marijuana on October 21, 2008, it was discovered that he was wanted by the state of Mississippi for a probation violation. App. 521, ll. 4 – 8. Petitioner waived extradition and was taken to Mississippi where he ultimately was sentenced to a term of imprisonment there. App. 521, ll. 8 – 14. Petitioner never returned to the apartment after October 21, 2008.

Trial counsel repeatedly, throughout the trial, suggested that Robinson's murder had to have taken place after October 21, 2008 because law enforcement did not find any evidence that a murder had occurred when they were inside the apartment on that date. The assistant solicitor argued to the judge that because trial counsel was making this argument, the state needed to

³ It is important to keep in mind that the body believed by the state to be Robinson's was not discovered until July of 2009 which marked the beginning of the criminal investigation into his disappearance.

explain to the jury *why* Petitioner did not return to the apartment after October 21, 2008. App. 520, l. 14 – 521, l. 19.

Counsel maintained to the trial judge that he only intended to argue that Petitioner left the apartment on October 21, 2008 and never returned; he had not opened the door to any testimony that Petitioner was imprisoned in Mississippi. App. 522, l. 13 – 523, l. 7. The assistant solicitor responded: “[T]hat essentially closes the door for suggesting to the jury that the murder took place after [October 21]. Because if there’s going to be an argument that the murder took place after that date, then I think we have an obligation to explain why [Petitioner] wasn’t in his apartment.” App. 523, ll. 12 – 18.

While the trial judge acknowledged that Petitioner had not, at that point, placed his character in issue, the judge still said to defense counsel: “I can’t allow you to suggest that he didn’t go back after that time and not explain that.” App. 523, l. 19 – 524, l. 4. Counsel then said: “I’m comfortable with the solicitor asking the investigators, did you go to Mississippi Corrections to visit [Petitioner], but not get into the details of why he’s there.” App. 525, ll. 8 – 13. Counsel therefore unnecessarily consented to evidence coming in that Petitioner was imprisoned in Mississippi when the investigators interviewed him about the recovered body that was believed to be Robinson’s, without any context as to why Petitioner was in prison. App. 529, l. 22 – 531, l. 2. The state elicited testimony from Investigator Gilbert Gallegos and Investigator Holdorf that the two of them went to interview Petitioner in the Mississippi Department of Corrections. App. 571, l. 25 – 572, l. 8.

At the PCR hearing, trial counsel testified that the reason he consented to the admission of Petitioner being imprisoned in Mississippi was to support his defense of alibi. App. 892, l. 5 – 893, l. 10. However, counsel admitted that he did not file a notice of intent to raise an alibi

defense. App. 898, ll. 6 – 11. Counsel also admitted that because the state’s theory was that the murder took place on September 27, Petitioner’s presence in the Mississippi Department of Corrections after October 21 was not an alibi to the date of September 27. App. 895, ll. 12 – 25. Finally, counsel was unable to give a strategic reason for not letting the jury hear why Petitioner was in prison in Mississippi, which was for a burglary charge, and instead let the jury speculate that it was possibly something more serious. App. 896, ll. 1 – 18.

Discussion

In Felder v. State, 427 S.C. 518, 832 S.E.2d 591 (2019), this Court found that trial counsel was ineffective for failing to object to testimony that the defendant was on bond for lynching at the time he was questioned by investigators about his alleged involvement in a murder. Interestingly, one of Felder’s trial attorneys testified at the PCR hearing that the defense theory was essentially that of alibi:

[Trial counsel] went on to explain that the defense’s theory was Felder could not have gotten from his home to murder the victim within three minutes. [Counsel] then added: “So that seemed to be our theory at reasonable doubt. Whether our client had a pending charge or not was not as important to me as was getting across to the jury that he couldn’t have done it.”

Id. at 524, 832 S.E.2d at 594. Furthermore, in Felder, the evidence that the defendant was on bond for lynching was introduced through his own statement given to law enforcement, the admissibility of which was stipulated to by defense counsel.

Petitioner’s case is very similar to Felder. Here, Petitioner’s trial counsel consented to the admission of evidence that Petitioner was incarcerated in Mississippi when he was questioned by law enforcement regarding his alleged involvement in a murder. Furthermore, like in Felder, one of defense counsel’s arguments to the jury was that of alibi. While counsel did not claim he missed the objection because he was focused on the defense of alibi, he

unreasonably took the position that Petitioner being incarcerated in Mississippi was helpful to his alibi defense.

Counsel's reasoning was flawed, as there was never any dispute among the parties that Petitioner left the apartment where Robinson's murder allegedly occurred on October 21, 2008 and never returned. The jury did not need to hear that Petitioner was imprisoned in Mississippi to know that he did not return to the apartment. Instead, it was enough to show that he never went back to the apartment after October 21, and therefore, if the murder happened after October 21, Petitioner could not have possibly been guilty. Counsel's deficiency came when, instead of merely leaving the evidence at Petitioner's not returning to the apartment after October 21, counsel consented to the jury hearing that the reason he did not return was because he was in prison in Mississippi. This was improper bad character evidence which was wholly unnecessary to the establishment of his alibi defense.

The PCR judge erred in finding that trial counsel was not ineffective in failing to object to testimony that Petitioner was imprisoned in Mississippi at the time he was questioned regarding Robinson's alleged murder. Counsel's reasoning that Petitioner's imprisonment in Mississippi aided in his supposed alibi defense was not a reasonable trial strategy because: (1) the state alleged the murder took place before Petitioner was incarcerated in Mississippi; (2) Petitioner's imprisonment was unnecessary in establishing that he did not return to the apartment after October 21, 2008. Trial counsel's deficiency prejudiced Petitioner because the jury was likely to decide the case on the impermissible basis that Petitioner was a bad and dangerous person who had to be imprisoned in a different state. See Felder v. State, 427 S.C. 518, 832 S.E.2d 591 (2019).

The PCR judge erred in finding that counsel was not ineffective for failing to properly object to the introduction of the death certificate of decedent because counsel argued in closing there was no proof the remains were Robinson's, yet did not object on Rule 403, SCRE grounds and did not make a contemporaneous objection when the state introduced the death certificate.

Relevant Facts

At Petitioner's trial, the state sought to introduce a death certificate purportedly attesting to the fact that Robinson was dead as a self-authenticating document. App. 516, ll. 15 – 22. Trial counsel objected stating that he did not “believe the information [was] true and accurate.” App. 516, l. 24 – 517, l. 1. Counsel argued: “[T]here's been absolutely no testimony that the remains that were found have been positively identified as Ernest Robinson.” App. 517, ll. 11 – 14. Counsel objected that the death certificate included the cause of death, a gunshot wound to the head, and the date of death, which was in dispute by the parties. App. 518, ll. 1 – 20.

The trial judge overruled defense counsel's objection: “It's a public document. Everybody relies on it. It's an exception to the hearsay rule. I can go on and on.” App. 519, ll. 14 – 20. In his closing argument to the jury, defense counsel argued that there was no evidence identifying the remains that were found as belonging to Robinson. App. 765, l. 25 – 766, l. 12; app. 779, ll. 5 – 14.

At the PCR hearing, counsel testified that his concern with the death certificate was that the skeletal remains were never positively identified as being those of Ernest Robinson, but the death certificate still listed Ernest Robinson's name on it. It also had the cause of death and was an official state document which counsel thought would lead to the jury presuming it to be true. App. 889, ll. 12 – 25.

Counsel claimed at the PCR hearing that his objection to the death certificate was based on Rule 403, SCRE, even though he never cited to this rule or argued that it was unfairly prejudicial. App. 890, l. 5 – 891, l. 19. Counsel further admitted that he did not make a contemporaneous objection when the state moved to introduce the death certificate and that he did not recall if there was any trial strategy behind that decision. App. 891, l. 24 – 892, l. 4. Specifically, when the state moved to introduce the death certificate into evidence, the judge asked defense counsel if he had any objection for the record and counsel said “[n]o.” App. 532, ll. 3 – 7.

In his order of dismissal, the PCR judge found that the death certificate was “not hearsay pursuant to Rule 803(8) and (9)” and that trial counsel’s testimony that he made a 403 objection was credible. App. 945. In fact, the PCR judge said: “[A]t trial, Counsel argued the death certificate was prejudicial because it contained the State’s seal and was not probative because it could mislead the jury.” App. 945.

Discussion

The PCR judge’s finding that trial counsel made a Rule 403, SCRE objection to the introduction of the death certificate was incorrect. Trial counsel never referenced Rule 403, SCRE or the concepts of probative value and unfair prejudice. Instead, counsel only made a vague argument that the document was not “true and accurate.”

Counsel’s argument was insufficient to convey to the trial judge that the objection was that the probative value was substantially outweighed by the danger of unfair prejudice. Furthermore, in allowing the death certificate into evidence, the trial judge said nothing of Rule 403, SCRE, nor did he conduct a probative value and unfair prejudice balancing test. Instead, the trial judge said he was admitting the document because it was a public document and an

exception to hearsay. Trial counsel failed to point out that his objection was not a hearsay objection. Because counsel failed to object to the death certificate under Rule 403, SCRE, the issue was not preserved for appellate review.

Even if the PCR judge was correct in finding that counsel did make a 403 objection, counsel still failed to make a contemporaneous objection when the state moved to introduce the death certificate. In fact, the trial judge specifically asked counsel if he had any objection for the record at the time the state moved to introduce the death certificate and counsel said “no.” App. 532, ll. 3 – 7. In affirmatively stating on the record that he had no objection to the death certificate at the time it was moved to be introduced into evidence by the state, counsel waived any previous objection for appellate purposes. Counsel’s failure to contemporaneously object was deficient because he waived the issue for appellate review.

In Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018), this Court found that where trial counsel failed to contemporaneously object to the introduction of drugs found in a Terry⁴ frisk of the defendant, “the appropriate inquiry [was] whether the search conducted by the deputies was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal.” The Milledge Court found that the trial judge’s finding that the officer had reasonable suspicion to conduct the pat-down was supported by the record and therefore the defendant would not have prevailed on appeal. Thus, trial counsel’s deficiency in failing to contemporaneously object to the drugs did not result in prejudice to the defendant. Id. at 380, 811 S.E.2d at 804.

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), this Court held that trial counsel’s failure to object to testimony that the defendant had previously committed a burglary

⁴ Terry v. Ohio, 392 U.S. 1 (1968).

in order to obtain a shotgun which was subsequently used in the armed robbery for which the defendant was on trial was deficient performance. The Smalls Court ruled that this was “an improper effort to introduce evidence that Smalls committed another crime,” in violation of Rule 404(b), SCRE. Id. at 186, 810 S.E.2d at 842.

The Court went on to find that counsel’s failure to object to the testimony that the defendant had committed a burglary in order to obtain the shotgun “significantly undermine[d] confidence in the outcome of the trial” and that there was a “reasonable probability that but for counsel’s errors, the result of the trial would have been different.” Id. at 195, 810 S.E.2d at 847 (internal quotations omitted).

Trial counsel’s failure to properly preserve his objection to the death certificate for appellate review, in this case, prejudiced Petitioner. The state could not prove that Petitioner was guilty of murder without first proving that Ernest Robinson was dead. The state sought to use the death certificate as conclusive proof that the body which was recovered was in fact that of Ernest Robinson. The assistant solicitor argued that in his closing:

You will also have in the jury room with you, Death Certification State of South Carolina with the decedent’s name, Ernest Melvin Robinson, Jr., presumed – actual or presumed date of death September 28, 2008. Manner of death homicide. Cause of death, gunshot wound to the head. Place of injury. [] Elders Pond Circle, Apartment []. Location of injury. []. How injury occurred. Beaten and shot by someone.

Official state document says that Ernest Robinson is dead, and that he died on the day in question by the manner in which these witnesses testified. You’ll have that back in the jury room with you.

There is no question that that body belonged to Ernest Robinson.

App. 748, l. 20 – 749, l. 8 (emphasis added). The state relied heavily on the death certificate in its effort to prove that Ernest Robinson was in fact dead.

The death certificate, however, was erroneously allowed into evidence by the trial judge. Rule 403, SCRE, permits relevant evidence to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

The probative value of the death certificate was exceedingly low in that the body which was examined by the coroner and the pathologist was never actually confirmed to be that of Ernest Robinson. The danger of unfair prejudice was also extremely high for exactly the reasons argued by the assistant solicitor in his closing argument – the death certificate was an “official state document” which confirmed everything that the witnesses had testified to. This was a backdoor way for the assistant solicitor to bolster the testimony of the witnesses with an “official state document.” Thus, trial counsel’s deficiency in failing to preserve the issue for appellate review resulted in prejudice to Petitioner. The PCR judge erred in finding that trial counsel’s failure did not constitute ineffective assistance of counsel. See Rule 403, SCRE; Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

The PCR judge erred in finding that counsel was not ineffective in failing to object to the opinion testimony of Deputy Coroner Bill Stevens regarding wind and air currents preventing the smell of the decomposing body from traveling in the direction of the apartment complex in an attempt to explain why there were no reports of smelling a dead body because Stevens was never qualified as an expert in this field and one of counsel's major themes throughout his questioning of witnesses and his closing argument was that the murder took place at a later date than alleged by the state which was supported by the fact that nobody reported smelling the body.

Relevant Facts

Throughout Petitioner's trial, his counsel cross-examined numerous witnesses regarding the potent smell of a dead human. App. 151, ll. 15 – 20; app. 169, l. 24 – 170, l. 6; app. 248, l. 22 – 249, l. 4; app. 280, l. 21 – 282, l. 10; app. 376, ll. 14 – 21; app. 561, ll. 11 – 22. Specifically, trial counsel made repeated references to how strong of an odor a dead body gives off and how unlikely it would be that nobody would have noticed the smell of a decomposing body next to an apartment complex for several months. Furthermore, counsel argued in closing that Kim Hunt, the property manager of the apartment complex where the body was found, testified that she walked the property once a week and never smelled a dead body there. App. 767, l. 16 – 768, l. 1.

The state called Deputy Coroner William Stevens to the stand and he was qualified as an expert in forensic anthropology. App. 534, ll. 9 – 13. Stevens was asked on direct-examination about why a person might not notice the smell of a dead body even when it is close-by:

[T]he back of Building 16, right here, is on the slope which leads down to a pond and a low lying area, and so I looked into some of the literature on air currents . . . Air currents coming upslopes and off of ponds produce eddies and they produce swirling wind

currents, so it's likely that at certain times that odor would not have even been carried up that slope toward those buildings, based on my review of the literature on that.

App. 551, ll. 11 – 25. Counsel for Petitioner did not object to this testimony. In his closing argument, the assistant solicitor referenced this testimony:

Other theories that have been alluded to by the defense in this case. They have made a great deal of references to decomposition and odors, alleging or inferring that how come no body [sic] had smelled the body. Well, there was plenty of testimony about the environment. This body was down an embankment, down a hill. Stevens talked to you about the wind, how the wind direction could have blown the smell in other directions, but more important that that [sic] was Stevens and Dr. Nichols told you wrapping a body – well, Stevens told you the body was partially mummified – would conceal the smell, wouldn't conceal all of it, but wrapping a body in a shower curtain would conceal the smell.

App. 755, l. 24 – 756, l. 10. This argument was also not objected to by Petitioner's trial counsel.

Trial counsel testified at the PCR hearing that he did not recall why he did not object to this testimony regarding air and wind currents. App. 900, ll. 1 – 15. Counsel further testified that he was not sure whether Stevens, who was qualified as an expert in forensic anthropology, was qualified to give his opinion on air and wind currents. App. 900, ll. 16 – 20.

In his order of dismissal, the PCR judge acknowledged that this testimony was outside the scope of Stevens' field of expertise and qualifications. App. 950. However, the PCR judge found that Petitioner was not prejudiced by this testimony because there was "overwhelming evidence of [Petitioner's] guilt." App. 950.

Discussion

In Kranchick v. State, 418 S.C. 435, 793 S.E.2d 314 (Ct. App. 2016), the Court of Appeals found that trial counsel was deficient in failing to object to the state's forensic toxicologist in a felony DUI resulting in death trial testifying outside the scope of his

qualifications and expertise. Specifically, trial counsel did not object to the forensic toxicologist's testimony regarding the effects of marijuana, cough suppressants and antihistamines which were found in the defendant's blood after the accident. Id. at 439, 793 S.E.2d at 316. The forensic toxicologist had not testified that he had any experience, knowledge or education in these matters. While the Kranchick Court affirmed the PCR judge's finding that this was deficient, it nevertheless found that the deficiency did not result in prejudice to the defendant because of the overwhelming evidence that she was impaired at the time of the collision. Id. at 444-446, 793 S.E.2d at 319-320.

In this case, the "overwhelming" evidence of Petitioner's guilt consisted of two co-defendants and an ex-girlfriend who all had questionable motives. The two co-defendants who testified, Jones and Fulton, both acknowledged wanting to get out of jail. App. 470, ll. 17 – 20; app. 495, ll. 18 – 22; app. 509, l. 9 – 510, l. 11. Fulton even admitted that he lied to the police when he spoke to them and that when he was questioned by law enforcement, he was in jail on an unrelated burglary charge which was still pending in the same county as his murder charge at the time of Petitioner's trial. App. 492, l. 16 – 493, l. 23.

Petitioner's ex-girlfriend, Jazmine Bright, also gave dubious testimony against him. She testified that she was at home sleeping on the night that Robinson was allegedly killed. App. 661, l. 7 – 662, l. 24. Bright claimed that while she was sleeping, she thought she heard a gunshot come from the apartment next door but that she just went back to sleep because she "didn't realize that it was [an] actual gunshot." App. 662, l. 25 – 663, l. 8. When she got up to go to work the following morning, Bright said that she did not notice anything out of the ordinary in the apartment. App. 664, l. 18 – 665, l. 15. Bright ultimately claimed that Petitioner confessed to killing Robinson to her. App. 629, l. 16 – 631, l. 6.

Jones, Fulton, and Bright's testimony, even when taken as a whole, did not amount to overwhelming evidence of Petitioner's guilt. Fulton and Jones had strong motivation to lie in order to get a favorable outcome in their own cases by testifying against Petitioner. They also had strong motivation to minimize their own involvement while putting as much blame as possible on Petitioner.

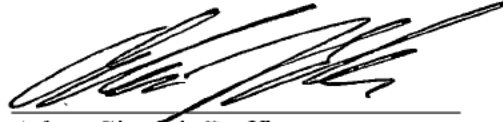
If the murder happened in the manner the state claimed it happened, Bright's testimony that she only heard a gunshot and then went back to sleep was not credible. The event as described by Jones and Fulton was a very violent and loud beating culminating in Petitioner supposedly shooting Robinson in the head. It is doubtful that Bright would not have been woken up by such a violent event and even more unlikely that she would not have seen any evidence that a brutal murder had taken place in her apartment when she came out of her room the following day.

Because the evidence against Petitioner was not overwhelming, he was prejudiced by trial counsel's failure to object to Stevens' testimony regarding wind and air currents preventing the smell of a dead body being noticed by people in the apartment complex. The date of Robinson's death was a crucial aspect of Petitioner's defense at trial. When viewed in the context of his alibi defense, it was essential that trial counsel object to this improper opinion testimony that was far outside Stevens' field of expertise. The opinion testimony given by Stevens' regarding the wind currents was a way for the state to improperly contest a central theme by defense counsel regarding the lack of any reports of smelling a dead body. Had counsel objected to this improper character evidence it is likely that the jury would have found that Robinson's death happened later than the state claimed it did, thus giving more significance to Petitioner's alibi defense. The PCR judge erred in finding that trial counsel was not

ineffective for failing to object to Stevens' testimony. See Kranchick v. State, 418 S.C. 435, 793 S.E.2d 314 (Ct. App. 2016).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

VICTOR D. SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

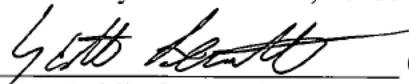
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Victor Smith, #348112, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 27th day of November, 2019.



Adam Sinclair Ruffin
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER,
this 27th day of November, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: September 27, 2028.

