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Nov 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Case No.: 2017-CP-02-0129
Appellate Case No.: 2018-001674

John Upson #229134,, Respondent

v.

State of South Carolina,Petitioner,

PETITION FOR APPEAL BOND

Respondent, through his undersigned counsel, respectfully petitions this Court for an Appellate Bond pursuant to Rule 240, SCACR, and Rule 243 (k), SCACR. Respondent is requesting an Appellate Bond during the pendency of the appeal of the Order Granting Post-Conviction Relief, which was signed by the Honorable R. Scott Sprouse on July 13, 2018 and attached hereto. This is a third request. The original request was denied on February 20, 2019. The second request was denied on or about June 10, 2020. Certain circumstances have changed since the first and second Petitions. To wit:

- 1) The Coronavirus has significantly impacted the prison system. The ability to advance is extremely difficult. Many pre-pandemic programs are not existent which makes it difficult to rehabilitate in the system.

- 2) The Respondent has had one disciplinary in his nine (9) years of incarceration. He has attempted to rehabilitate himself and learn from this experience.
- 3) The Appellant has been diagnosed with Glaucoma and wishes to be able to obtain outside medical treatment for this condition. Due to understaffing in the prison system, outside medical treatment is almost impossible to obtain, and he is fearful that he may lose his sight. In addition, the Appellant has recently been diagnosed with diabetes. He is currently on insulin and although the Department of Corrections says that they have diabetic meals available, these meals are loaded with bread, rice and other carbohydrates, which makes it very difficult for him to control his sugar levels.
- 4) The Appellant's Father is 92 years old. His health is failing and his Mother has onset Alzheimer's. That the Appellant would ask that the Court consider his request for an appeal bond so that he can be there to assist his parents.
- 5) The Appellant is not a flight risk. He is a lifelong resident of Aiken, South Carolina.

POST CONVICTION RELIEF PROCEDURAL HISTORY

The Respondent is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Respondent for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Respondent. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Respondent proceeded to trial before the Honorable Donald B. Hocker. The jury found Respondent guilty as indicted. Judge Hocker sentenced Respondent to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Respondent filed a timely notice of appeal. John H. Strom, Esq., of the Office of Appellate Defense perfected the appeal. The issue raised on Appeal was the trial court erred in denying Respondent's directed verdict motion where the evidence presented at Respondent's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Respondent's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In the Application for Post-Conviction Relief, Respondent alleged that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
 - a. "Failure to fully cross-examine Jameshia Alston."
 - b. "Failure to ask for Neils v. Biggers hearing."
 - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
 - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Respondent."
 - e. "Failure to object to Respondent being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
 - f. "Failure to object to in-court identification."
 - g. "Failure to object to bolstering by the State during closing arguments."

This matter was before the Lower Court pursuant to an Application for Post-Conviction Relief filed on January 23, 2017. The State filed their Return on May 16, 2017. Present before the Court was Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Respondent was present represented by his attorney Tommy A. Thomas. Witnesses for the Respondent, Tom Slovinski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

An Order Granting Post Conviction Relief was signed by the Honorable R. Scott Sprouse on July 13, 2018. The Court found in part the basis for granting Post Conviction Relief was:

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the Respondent's claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the Respondent was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the Respondent's name. Counsel for the Respondent failed to challenge this by either requesting a Neil v. Biggers hearing or by objecting to its admission at trial.
3. The Court is particularly concerned with the testimony regarding Respondent's "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the Respondent failed to challenge this on cross-examination.
 - a. The Court observed the Respondent at the evidentiary hearing and had the opportunity to personally study the Respondent's facial features. The Court found that the Respondent clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the Respondent's conviction.
4. The Respondent also asserted an alibi defense that the State discredited through expert testimony that Counsel for the Respondent failed to challenge.

a. At the evidentiary hearing, the Respondent presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically found and concluded that both prongs of Strickland have been met by the Respondent. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the Respondent.

GROUND AND SUPPORT OF REQUEST FOR BOND

That the Lower Court was very specific in its findings and conclusions. The court had the opportunity to review the entire record and heard the testimony and argument presented at the hearing. The court also noted that it had the opportunity to observe the witnesses and pass upon his credibility and that the Court was able to weight this testimony accordingly. The Court also reviewed all of the records available from the Clerk of Court's Office and the South Carolina Department of Corrections.

The Court found and concluded that the identification of Respondent was a key issue at Trial. The court found that this identification issue there was testimony of a witness who had pulled a photograph from Facebook. When she spoke with law enforcement, she was presented with a list of names that included the Respondent's name. The Court found that Respondent failed to challenge this identification either by requesting a Neil v. Biggers hearing, or by objecting to the admission at trial.

The Court was particularly concerned about the testimony regarding Respondent's lazy eye. Testimony provided a significant basis upon which the State's witness relied upon in making her identification. Once elicited at trial, Counsel for Respondent failed to challenge this on cross-examination. The Court notes that it observed the Respondent at the evidentiary

hearing and had an opportunity to personally study the Respondent's facial features. The Court found that the Respondent clearly did not have a lazy eye and the Court was concerned that this evidence is a misidentification that lead to the Respondent's conviction.

At the evidentiary hearing, the Respondent also presented testimony through an expert witness who was recognized by the Court as an expert in the field of forensic cell phone technology. This witness testified and created a significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness about the usage of a pie method for locating the Respondent regarding the times in question. Counsel for the Respondent would also assert that there were other points of testimony of the State's witnesses that were brought into doubt by the use of expert testimony at the evidentiary hearing.

The Lower Court specifically found that the Respondent had met his burden of proving both prongs of Strickland and that trial counsel's performance was deficient for the reasons contained in the Court's Order.

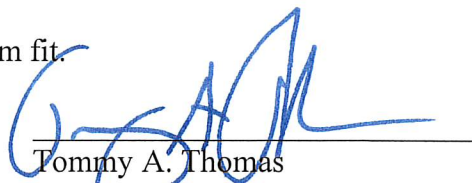
Rule 243 (k) SCACR, bail pending Appellate review specifically outlines the process in which the Respondent must make a request for Bail. In determining whether to exercise the discretion and the authority to admit an Applicant to Bail, the Court list the following factors to be considered:

1. The probability that the Respondent will prevail on Appellate Review: The Respondent would assert that the Lower Court's decision is based upon substantial fact and the law and therefore, he has a high likelihood of prevailing.
2. That the nature of the relief requested is that the conviction will be set aside.
3. The seriousness of the criminal offense committed: The Respondent admits that this is a serious crime. The Respondent asserts that he is not guilty of this crime. In

addition, no one was physically injured in this robbery. There also appears to be no testimony in the Trial Court's transcript that any money was actually taken from the subject location.

4. The danger that the Respondent may pose to the community: The Respondent would assert that he is not a danger to the community. In fact there are a number of members of the community who would welcome him back. They would also be available to provide assistance to him should it become necessary while on bond. The Respondent is a life-long resident of Aiken County. He would be living with his father in Aiken County. While he was out on bond for these charges, he never missed a Court appearance and always reported as requested. He is 51 years old. The Respondent has been to Barber School and he would be able to obtain employment in this field upon his release on bond.
5. The likelihood that the Respondent may flee if released: The Respondent is a life-long resident of Aiken County and would be living with his father in Aiken County. All of the Respondent's contacts, including employment, would be in Aiken County and he has no history of bond forfeiture for not showing up for court. Therefore, there is no likelihood that the Respondent would flee.

The Respondent would respectfully request that this Court grant an Appeal Bond and impose any conditions of this Bond as the Court may deem fit.



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APPEAL FROM AIKEN COUNTY
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John Upson #229134,, Respondent

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State of South Carolina,Petitioner,

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant, hereby certify that I placed in the United States Mail, a copy of a Petition for Appeal Bond with Supporting Documents with postage prepaid and the return address clearly shown on said envelope to the following at:

Megan Harrigan Jameson, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



Jacquelyn E. Miller
Secretary to Tommy A. Thomas
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Via Email

V. Clare Allen, Deputy Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

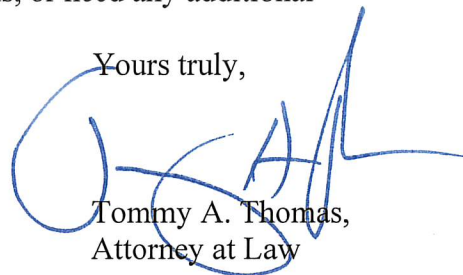
RE: John Upson v. State
Appellate Case No.: 2018-001674

Dear Ms. Allen:

Please find attached a Petition for Appeal Bond regarding the above referenced matter, as well as a Certificate of Service for filing.

Thank you and should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Mark R. Farthing, Esq. - via email

TOMMY A. THOMAS, P.C.

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