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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

AUSTIN MCQUARTERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000628

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to conduct an independent investigation and interview a witness who came forward after trial and told law enforcement that two weeks before John Snodgrass was assaulted and robbed, Colton Delaplane, a State's witness who implicated Petitioner, stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery?

STATEMENT

In January of 2014, the Beaufort County Grand Jury indicted Petitioner, Austin McQuarters, for assault and battery first degree and armed robbery of John Snodgrass, indictments #2013-GS-07-1844, 1845. (App. pp. 623-626). On July 20, 2015, Petitioner proceeded to jury trial before the Honorable Thomas W. Cooper, Jr. This was a re-trial as the first trial ended with a hung jury. This second jury returned verdicts of guilty as charged. Judge Cooper sentenced Petitioner to twenty-five (25) years for armed robbery and ten (10) years concurrent for assault and battery. On August 12, 2015, Judge Cooper reduced the twenty-five (25) year sentence for armed robbery to twenty (20) years. A timely notice of intent to appeal was served on August 20, 2015, and the direct appeal perfected. (App. pp. 1058-1097). The Court of Appeals affirmed the sentence and conviction. State v. McQuarters, Op. No. 2017-UP-320 (Ct. App. Filed August 2, 2017). (App. pp. 1098-1099).

On January 29, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 1100-1106). The State filed a return and partial motion to dismiss on May 1, 2018. (App. pp. 1107-1112). An evidentiary hearing was held on March 10, 2022, before the Honorable Robert J. Bonds. James Falk represented Petitioner at the PCR hearing. Lauren Mims represented the State. In a written order filed April 27, 2022, Judge Bonds denied relief and dismissed the application. (App. pp. 1147-1157). A timely notice of intent to appeal was served on May 9, 2022. This petition for writ of certiorari follows.

FACTS

On October 20, 2013, between 10:30 and 11:00 PM John Snodgrass, the general manager of a movie theatre on Hilton Head Island, was robbed and assaulted as he left the theatre with the bank deposit bag. (App. pp. 166-178). Snodgrass testified that he noticed a female in a small older Toyota and a six foot tall broad shouldered African American man crouched down by the driver's door. (App. p. 170, line 3 – p. 171, lines 1-6). The man approached Snodgrass and initially asked about movie times, then asked to borrow a cellphone, then asked for the time of day. When Snodgrass looked down at his watch, the man assaulted and robbed him. (App. p. 171, line 11 – p. 172, 173, lines 1-18).

Investigator Doug Seifert with the Beaufort County Sheriff's Department interviewed employees of the movie theatre who were working on the night of the robbery including employee Colton Delaplane. (App. p. 356, line 21 – p. 357, 358, lines 1-22). Based on the interview with Delaplane, Investigator Seifert obtained arrest warrants for Petitioner McQuarters and Jacklyn "Brooklyn" Perez. (App. p. 360, lines 15-17). The investigator admitted that in his report he stated that Delaplane confessed that the entire robbery was set up by him, he was sorry and admitted that McQuarters gave him two hundred and fifty ($250.00) after the robbery. (App. p. 381, lines 7 – 24). The investigator, however, testified that these were not Delaplane's exact words and explained that he was paraphrasing Delaplane when he wrote the report. (App. p. 362, line 9 – p. 363, lines 1-12). The investigator admitted that in the first trial that ended in a mistrial he did not explain that his report was his conclusion or a paraphrase and not Delaplane's exact words. (App. p. 383, lines 1-25).

Petitioner admitted being at the movie theatre with a female on the night of the robbery but denied robbing and assaulting Snodgrass. (App. p. 374, line 9 – p. 375, lines 1-3). There

was no forensic evidence linking Petitioner to the robbery and assault. (App. p. 390, line 25 – p. 391, lines 1-25). Snodgrass was unable to identify Petitioner in a photo line-up. (App. p. 193, lines 3-10). Both Perez and Delaplane testified against Petitioner at trial. After Perez testified but before Delaplane testified these two witnesses violated the sequestration order. Petitioner moved for a mistrial which the trial judge denied finding no prejudice. (App. pp. 226 – 242). Delaplane testified that he was working at the movie theatre on the night of the robbery and assault. (App. p. 311, lines 14-25). Delaplane testified that he saw both Petitioner and Perez at the movie theatre that night. (App. pp. 312-313). Delaplane claimed that while he was working in the ticket booth, Petitioner approached and wanted money from the drawer. (App. p. 312, lines 3-15). Perez admitted that she asked Delaplane, "Where is the bread?" but claimed she was referring to gas money Delaplane owed her. (App. p. 547, lines 4-21; p. 534, lines 13-19).

According to Delaplane, he again saw Petitioner and Perez in the parking lot when he left work at 10:30 PM. (App. p. 312, line 21 – p. 296, lines 1-17). Delaplane claimed he left the movie theatre parking lot with his sister and girlfriend and went home. (App. p. 315, lines 11-19). Delaplane testified that about three hours later he met Petitioner who handed him two hundred and fifty ($250.00) dollars. (App. p. 316, lines 1-19). According to Delaplane, Petitioner told him, "I ran into money at your work." (App. p. 316, lines 14-15). Delaplane was never arrested or charged in connection with the robbery and assault. (App. p. 362, lines 16-18).

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to conduct an independent investigation and interview a witness who came forward after trial and told law enforcement that two weeks before John Snodgrass was assaulted and robbed, Colton Delaplane, a State's witness who implicated Petitioner, stated that he wanted to hit Snodgrass in his face and later confessed that he knew about the money but did not know that Snodgrass was going to be hurt so badly during the robbery.

Petitioner alleged at the PCR hearing "that trial counsel was ineffective for failing to call or investigate Christy (ph), known Randy Rossi (ph), whose statements triggered trial counsel to file a motion for after-discovered evidence." (App. p. 1117, lines 1-4). On July 24, 2015, two days after the jury returned guilty verdicts and the judge sentenced Petitioner, John Snodgrass, the general manager who was robbed and assaulted, contacted Investigator Seifert of the Beaufort County Sheriff's Department and advised him that his manager, Chisti "Randi" Ross, had information indicating that an employee, Colton Delaplane, set up the robbery. (App. p. 613). The investigator interviewed Ross and she provided a written statement. (App. p. 615). In her statement Ross wrote that on November 3, 2013, while working with Delaplane, he told her "I knew about the money but I didn't know John was going to get hurt like that." (App. p. 615). Ross told the investigator that she did not provide this information to the police because she did not want to be involved in the investigation due to an unrelated criminal domestic violence incident. (App. p. 613). Ross also told the investigator that two weeks prior to the incident Snodgrass yelled at Delaplane. Delaplane told Ross that he wanted to punch Snodgrass in the face for yelling at him. Ross told the investigator that Delaplane stated, "If John ever screams at me in my face again, I'm going to punch him." (App. p. 614). Ross was not called as a witness at trial.

Based on the information provided by Ross, Petitioner filed a motion to vacate conviction and order a new trial based on after discovered evidence. (App. pp. 616-617). The State filed a

response on August 12, 2015. (App. pp. 618-622). On August 12, 2015, the Honorable Thomas W. Cooper, Jr. held a hearing on the motion to vacate conviction and order a new trial. Petitioner argued that the statements of Ross about admissions made by Delaplane that he knew about the robbery, the prior incident between Delaplane and Snodgrass and Delaplane's statement about wanting to punch Snodgrass constituted newly discovered evidence requiring a new trial. (App. pp. 574-594). The judge denied the motion for a new trial. (App. pp. 602 – 605). The failure to grant a new trial based on after discovered evidence was challenged on direct appeal. (App. pp. 1058-1073). The Court of Appeals affirmed the convictions and sentence. State v. McQuarters, Op. No. 2017-UP-320 (Ct. App. Filed August 2, 2017). (App. pp. 1098-1099).

The allegation of ineffective assistance of counsel does not involve the issue of after-discovered evidence raised on direct appeal. Instead, the allegation of ineffective assistance of counsel is trial counsel's failure to conduct an independent investigation and interview the witness, Chisti "Randi" Ross, who came forward with information after the trial. During the PCR hearing defense counsel testified that Ross's name was listed on the bottom of an incident report included with discovery and the report may have also included her position as an employee of the movie theatre where both Snodgrass and Delaplane worked. (App. p. 1134, lines 18-21). Trial counsel admitted that he did not interview Ross or any other employees of the movie theatre. (App. p. 1124, line 23 – p. 1125, 1126, 1127, lines 1-6). Trial counsel surmised that if he had sent an investigator to speak with Ross, she probably would not have provided the information as she did not provide the information to law enforcement prior to trial. (App. p. 1126, lines 11-14; p. 1127, lines 5-6). Trial counsel, however, did not attempt to interview Ross prior to trial.

Trial counsel presumably knew about a prior difficulty between the general manager, Snodgrass, and employee Delaplane because he cross-examined Snodgrass about the prior incident. (App. p. 197, lines 1-22). Trial counsel was ineffective in failing to conduct an independent investigation of the work environment at the movie theatre and interview Ross, another manager whose name was included in discovery. Petitioner was prejudiced by the deficient performance.

In the order of dismissal the PCR judge wrote:

> This Court finds Applicant failed to meet his burden of proving that Counsel's preparation or investigation was deficient. Counsel demonstrated through his testimony a thorough command of the facts and circumstances of Applicant's charges, and credibly testified to fully reviewing and investigating the evidence against Applicant that was reasonable. The information brought forward by Christi Ross would not have been available to Applicant at trial, as Ms. Ross did not initially speak with law enforcement due to fear of retaliation and for her safety. Counsel credibly testified that because of her unwillingness to speak with law enforcement, it would have been unreasonable to investigate her any further as a witness. Moreover, it was only after Applicant was convicted that Ms. Ross came forward with new information regarding Colton Delaplane, who had not been charged in the crime. Additionally, when Counsel received the new evidence, he filed a motion for a new trial and vacation of conviction on Applicant's behalf. At that hearing, Judge Cooper denoted that there was no lack of due diligence in counsel's representation regarding the evidence, because Ms. Ross was not presented as a witness that would have exculpatory information regarding his client. Furthermore, Applicant testified he did not know Christi Ross, so he could not have informed trial counsel about her existence to help with his defense. Accordingly, Applicant has failed to meet his burden of proving deficient representation.
>
> Moreover, Applicant has failed to show prejudice in that the discoverable matters would have changed the outcome of his trial. Counsel credibly testified that Ms. Ross' statement was cumulative and would have only been helpful in diminishing the credibility of one of the State's witnesses, and would not have changed or cast doubt on Applicant's role in the crime, as he was a closer match to the victim's description of the attacker that Colton Delaplane was. Furthermore, he was identified as the attacker by co-defendant Jacklyn Perez. Therefore, this Court finds that Applicant has failed to produce any evidence that Ms. Ross' statement would have changed the outcome of his trial.

(App. pp. 1155-1156). The PCR judge erred with regard to both deficient performance and prejudice.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 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, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "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, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Deficient Performance

Trial counsel was ineffective in failing to conduct an independent investigation of the work environment at the movie theatre and interview Ross, another manager whose name was included in discovery. The fact that Ross did not come forward and speak with police does not necessarily mean that she would have been unwilling to talk with counsel for Petitioner or one of his investigators. The trial judge's finding with regard to due diligence is not supported by the record. Trial counsel was aware of the name of potential witness Ross, her employment at the

movie theatre, and the fact that there was a prior incident between Snodgrass and Delaplane during the course of their employment at the movie theatre. The fact that the State did not obtain the statement from Ross does not relieve trial counsel of the duty to conduct an independent investigation.

In Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008), the South Carolina Supreme Court wrote, "A criminal defense attorney has a duty to perform a reasonable investigation. Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 597. '[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.' Id. at 331–32, 642 S.E.2d at 597 (internal quotes and citation omitted) (emphasis in original).

Trial counsel failed to conduct an independent investigation of the facts and circumstances of the case. An independent investigation would have led trial counsel to interview Ross, especially in light of the fact that her name and title were included in the discovery. Under an objective standard of reasonableness, trial counsel was ineffective in failing to conduct an independent investigation and interview Ross. Prior to trial counsel should have learned of Delaplane's statement to Ross, two weeks prior to the robbery and assault, that he wanted to punch Snodgrass in the face as well as his statement after the robbery that he knew about the money.

Prejudice

Petitioner was prejudiced by trial counsel's failure to interview Ross prior to trial. There is a reasonable probability that, but for counsel's failure to interview Ross prior to trial, the outcome of the proceedings would have been different. When asked about the importance of

Ross's statement, trial counsel testified, "Would have loved to have it." (App. p. 1127, line 12). Snodgrass gave a description of his attacker but was unable to identify Petitioner in a photo line-up. (App. p. 193, lines 3-10). The fact that Petitioner matched the description given more closely than Delaplane does not remove prejudice. The rest of the State's case was based on the testimony of Delaplane and the co-defendant, Perez, making their credibility a critical factor to be determined by the jury. Delaplane and Perez needed to curry favor with the State in order to avoid charges of any kind for Delaplane and to receive a lighter sentence or reduction or dismissal for Perez who was charged with armed robbery. (App. p. 558, lines 11-15). Ross's statement about the prior incident and Delaplane telling her he wanted to punch Snodgrass in the face was not cumulative and went to motive, especially in light of the fact that the injuries suffered by Snodgrass were to his face and head. Ross's information would have critically weakened Delaplane's credibility.

Additionally, the first trial ended in a mistrial because of a hung jury. (App. p. 1118, lines 6-16). In the second trial, unlike the first trial, Investigator Seifert equivocated about Delaplane's confession that he set up the whole robbery, although it was included in his written report. (App. p. 362, line 4 – p. 363, lines 1-18; p. 382, line 16 – p. 383, 384, lines 1-15). Delaplane denied setting up the robbery. (App. p. 331, line 7 – p. 332, lines 1-5; p. 333, lines 17-21). Delaplane's statement to Ross that he knew about the money would have further weakened his credibility.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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ATTORNEY FOR PETITIONER

This 5th day of December, 2022.