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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable William P. Keesley, Circuit Court Judge

KYNDRA L. HOWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001229

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel advised Petitioner not to testify since such advice was unreasonable and where Petitioner was prejudiced because there is a reasonable probability the outcome of her trial would have been different if she had testified and refuted the allegations against her?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner, Zachary Gantt, Jeremiah Johnson, and Ezra Williams kidnapped, robbed, and murdered the decedent, Chandrakant ("C.J.") Patel. The state conceded at trial that Petitioner was not present at the location where the decedent was shot and killed. It nonetheless proceeded under the hand of one is the hand of all theory of accomplice liability.

The decedent was reported missing by his son around midnight on the morning of July 2, 2012 after he had not been seen or heard from for several hours. App. 95, l. 23 – 96, l. 24. The Anderson County Sheriff's Office initially treated the case as a missing persons investigation. On July 3, 2012, the decedent's car was found on private land in a heavily wooded area in Fair Play, South Carolina. It appeared as if someone had attempted to hide the vehicle. App. 103, l. 10 – 104, l. 17.

Law enforcement obtained the decedent's telephone records from his son and discovered that shortly before the decedent was last seen, he had called Petitioner. App. 180, l. 18 – 182, l. 14. Also, his phone had last "pinged" in the area near Petitioner's residence. App. 190, ll. 22-23. Consequently, an officer went to Petitioner's house on July 3, 2012 and questioned her. Petitioner told the officer that the decedent had called her multiple times on the afternoon of July 1, 2012 and sought to have sex with her in exchange for money. Petitioner said she declined the decedent's multiple offers and did not see him that day. App. 100, l. 5 – 101, l. 9.

Later on July 3, 2012, Kimberly Lomax, Petitioner's friend, went to the Anderson County Sheriff's Office. She told investigators that Petitioner had called her multiple times on the night of July 1, 2012 and told her "they were holding C.J. [the decedent] hostage in her bedroom." App. 186, l. 21 – 187, l. 11; See App. 118, l. 15 – 119, l. 6.

Based on the information obtained from Lomax and the decedent's phone records, law enforcement obtained a search warrant for Petitioner's residence. The officers did not discover anything of evidentiary value inside the house. However, they did notice that the house had three security cameras mounted out front. Consequently, law enforcement contacted the landlord who owned the residence and learned that the cameras recorded to a "DVR box" that was stored in a closet inside the home. App. 191, l. 3 – 193, l. 23.

Investigators ultimately obtained a second search warrant for Petitioner's residence and seized the DVR box that contained the recorded surveillance footage. App. 193, l. 24 – 194, l. 15. Investigator Danny Barton reviewed the footage in his office and claimed it showed Petitioner and the decedent entering Petitioner's house on the afternoon of July 1, 2012. App. 194, l. 16 – 195, l. 6. In addition to the decedent and Petitioner, two Black males were also seen on the footage. They were later identified as Zachary Gantt and Jeremiah Johnson. App. 195, ll. 9-19. Based on this evidence, Petitioner, Gantt, and Johnson were all arrested and charged with kidnapping. App. 196, ll. 4-8.

Upon his arrest, Gantt gave two statements to law enforcement confessing to his role in the kidnapping, armed robbery, and murder of the decedent. He also implicated Petitioner, Johnson, and Ezra Williams. App. 201, ll. 8-14. As a result of Gantt's statements, Petitioner, Gantt, and Johnson were served with additional warrants for armed robbery, murder, and possession of a weapon during the commission of a violent crime. Williams was also arrested and charged with all four offenses. App. 208, ll. 3-12.

Gantt led law enforcement to the decedent's body on July 11, 2012, eight days after his car was found. It was located in a heavily wooded area approximately one hundred yards from the roadway and a few miles from the Georgia border. App. 108, ll. 1-24. The body was severely

decomposed. The forensic pathologist testified that the decedent died from a single gunshot wound to the head. The decedent also had several burns on his abdomen and numerous lacerations on his legs. App. 80, l. 1 – 88, l. 6.

Gantt testified against Petitioner at trial. He had already pled guilty, but his sentencing was deferred until after he testified against Petitioner, Johnson, and Williams. Gantt told the jury that he was incarcerated for murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. When asked by the solicitor, Gantt claimed that none of his charges had been reduced.[1] App. 130, ll. 9-23.

Gantt claimed that on the afternoon of July 1, 2012, he was at Petitioner's house playing videogames. At some point, Petitioner allegedly arrived at the residence with the decedent and, shortly thereafter, Johnson also arrived at the house. Gantt alleged that after the decedent went inside the house, Petitioner and Johnson called Gantt over to the carport where they were standing. He claimed Petitioner told them "that the man [the decedent] had some money" and Johnson suggested they rob him. App. 138, l. 2 – 141, l. 9.

After this conversation, the three entered the house and Petitioner went into the kitchen while Johnson and Gantt went to the bedroom where the decedent was located. Gantt testified that Johnson "grabbed" the decedent "and pulled him to the ground." Gantt held the decedent down while Johnson tied his hands behind his back with a telephone cord. According to Gantt, Johnson then took the decedent's wallet from his pocket and removed about seventy dollars in cash and several bank cards. App. 141, l. 20 – 143, l. 22. For the next several hours, Johnson and Gantt continued to hold the decedent in the bedroom and beat him in effort to obtain the "PIN numbers"

[1] After testifying against Petitioner, Jeremiah Johnson, and Ezra Williams, Gantt was allowed to withdraw his guilty plea to murder and pled guilty to the lesser included offense of voluntary manslaughter. He was sentenced to only twenty-two years imprisonment. App. 492, l. 3 – 493, l. 3.

for his bank cards. At some point, the decedent told the men his "PIN numbers" and Johnson left the home in the decedent's car to verify that the numbers were correct. When Johnson returned from the store, he told Gantt "that the man [the decedent] had given some wrong numbers." The men then resumed beating the decedent, but he continued to state the same numbers. App. 144, l. 9 – 146, l. 13.

Gantt testified that Petitioner remained in the kitchen while all this occurred and that she never entered the bedroom. App. 146, ll. 14-16.

Several hours later, Ezra Williams showed up at the house and became involved. Williams began to beat the decedent as well and when "he didn't get [anywhere] with" his fists, Williams sprayed the decedent with bug spray. Williams later heated a knife on the stove and placed the hot blade on the decedent's stomach multiple times. Eventually, Johnson decided he wanted to kill the decedent. The three men walked the decedent through the side door of the house, put him in the backseat of his own car, and drove out to a wooded area a few miles from the Georgia border. After the three men took the decedent into the woods, Williams shot him in the head. App. 148, l. 9 – 158, l. 14. They allegedly returned to Petitioner's house in the decedent's car and hours later, just before daybreak on the morning on July 2, 2012, disposed of the decedent's car in Fair Play, twenty-two miles from where his body was found. App. 158, l. 16 – 160, l. 16.

Gantt maintained that Petitioner remained in the kitchen of her house throughout the entire event and never tried to intervene. App. 146, ll. 14-19; App. 151, l. 19 – 152, l. 2; App. 152, ll. 14-17; App. 154, ll. 15-17.

An Anderson County grand jury indicted Petitioner on November 27, 2012 for the offenses of murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. App. 538-546. Her case was called to trial on February 23, 2015 before the

Honorable R. Lawton McIntosh, and a jury. App. 1. Assistant Solicitors Rame Campbell and Brantly Haigler represented the state, and Scott McElhannon represented Petitioner. App. 1.

The jury acquitted Petitioner of murder, but found her guilty of armed robbery, kidnapping, and the weapons offense. App. 328, l. 23 – 329, l. 22. Judge McIntosh sentenced Petitioner to thirty years imprisonment for kidnapping, fifteen years consecutive for armed robbery, and five years consecutive for possession of a weapon during the commission of a violent crime. App. 339, ll. 17-22. The aggregate sentence handed down by the court was fifty years imprisonment.

On March 31, 2015, a hearing was held on Petitioner's Motion for Resentencing. At the conclusion of the hearing, Judge McIntosh ordered Petitioner's five year sentence for possession of a weapon during the commission of a violent crime be served concurrently as opposed to consecutively in order to comply with our Supreme Court's holding in Major v. S. Carolina Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 682 S.E.2d 795 (2009).[2] App. 340, l. 4 – 344, l. 11. This reduced Petitioner's aggregate sentence to forty-five years imprisonment.

The Court of Appeals dismissed Petitioner's direct appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Howell, Op. No. 2017-UP-020 (S.C. Ct. App. filed January 11, 2017); App. 365-366.

On December 5, 2017, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 369-375. The state filed a return to this application dated March 15, 2018. App. 377-385. An evidentiary hearing was convened on March 3, 2022

[2] Shortly after Petitioner was sentenced, Assistant Solicitor Campbell and Defense Counsel McElhannon received a memorandum from the South Carolina Department of Corrections. The Department of Corrections advised counsel that Petitioner's sentence violated state law pursuant to our Supreme Court's holding in Major. As a result, trial counsel requested the court modify Petitioner's sentence. R. 340, l. 4 – 341, l. 16.

before the Honorable William P. Keesley. App. 388. Assistant Attorney General Taylor Smith represented the state. App. 389. Tommy Thomas represented Petitioner. App. 389.

Petitioner testified at the hearing that she wanted to testify at trial to refute the claims alleged by the state and, more specifically, Zachary Gantt, who testified against her. App. 410, ll. 20-24. Petitioner explained that the only reason she did not testify at trial was because trial counsel advised her that it was not in her best interest and she "assumed that he knew best." App. 411, ll. 10-15; App. 414, ll. 13-22. If she would have testified at trial, Petitioner would have told the jury what happened the day the decedent was killed. Petitioner explained during the PCR hearing that the decedent picked her up from her house that day. They were supposed to go to Kimberly Lomax's house so the decedent could have sex with Lomax. However, Lomax called Petitioner while they were on their way and said Lomax's mother was at her house and they had to wait for her mother to leave before they could come over. After waiting in the Lowe's parking lot for a while, the decedent drove back to Petitioner's house where they continued to wait for Lomax to call. App. 406, l. 1 – 408, l. 24.

Zachary Gantt, who was only seventeen, was at Petitioner's house playing videogames at the time. App. 409, ll. 2-13. Petitioner called Gantt and asked him to leave her house before she returned with the decedent so the decedent would be "more comfortable." App. 409, ll. 2-4. However, Gantt never left. Jeremiah Johnson and Ezra Williams later showed up at her house. Petitioner vehemently denied bringing the decedent to her house for purposes of robbing him. She did not even know if the decedent had money. App. 408, l. 25 – 409, l. 4; App. 412, ll. 15-18.

Petitioner testified that while the decedent was being tortured in a back bedroom, she was in the living room and occasionally in the kitchen and could not hear what was going on. App.

412, l. 25 – 413, l. 5. She "wasn't sure what they were doing." App. 426, ll. 12-13. Even if she knew what they were doing, she could not have stopped them. App. 429, ll. 6-14. Petitioner was terrified of Jeremiah Johnson and was repeatedly threatened by him. App. 415, ll. 21-25; App. 426, ll. 14-18.

Scott McElhannon, Petitioner's trial counsel, testified that he advised Petitioner of the advantages and disadvantages of testifying. The only advantage of Petitioner testifying "would have been for her to tell her side of the story." However, McElhannon was concerned about Petitioner being subject to cross-examination. App. 442, l. 22 – 443, l. 5. She would have been questioned about the surveillance footage that showed her coming in and out of the house several times and on the phone while the decedent was being held hostage inside. App. 443, ll. 1-5; App. 433, ll. 16-19. McElhannon also knew Petitioner would be impeached with her prior record, which included convictions for assault and battery of a high and aggravated nature, financial transaction card fraud, shoplifting, and leaving the scene of an accident. App. 441, l. 13 – 442, l. 1.

McElhannon testified that he believed there were only "negative consequences" and no real advantages of Petitioner testifying. App. 443, ll. 5-8. However, McElhannon never told Petitioner not to testify. The decision was "totally up to her." App. 442, ll. 8-9; App. 443, ll. 8-11. At the end of the second day of trial, the judge advised Petitioner of her right to testify on the record. The judge gave Petitioner "overnight to think about whether she wanted to testify." The following morning, Petitioner told McElhannon and the judge that she did not want to testify. App. 442, ll. 9-16; See App. 237, l. 12 – 240, l. 24 and App. 251, l. 17 – 252, l. 19. Again, McElhannon maintained this was Petitioner's decision alone. App. 443, ll. 8-11.

By order filed August 15, 2022, the PCR court denied Petitioner relief. App. 515-537. The court concluded Petitioner failed to prove trial counsel was deficient for advising Petitioner not to testify. Specifically, the court found Petitioner's testimony that trial counsel advised her not to testify was not credible and that trial counsel's testimony that he advised Petitioner of the potential benefits and risks of testifying but left the decision regarding whether to testify to her was credible. App. 529. The court further emphasized that the trial judge advised Petitioner of her right to testify, gave Petitioner a chance to think about her decision overnight during the middle of the trial, and that Petitioner ultimately told the judge that she did not want to testify. App. 529. As far as prejudice, the court determined that Petitioner's testimony concerning the allegations against her was not credible and that Petitioner failed to prove there is a reasonable probability the outcome of her trial would have been different if Petitioner had testified in her defense. App. 529-530.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel unreasonably advised Petitioner not to testify and since Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of her trial would have been different if she had testified and refuted the allegations against her, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel advised Petitioner not to testify since such advice was unreasonable and where Petitioner was prejudiced because there is a reasonable probability the outcome of her trial would have been different if she had testified and refuted the allegations against her.

Trial counsel was ineffective for advising Petitioner not to testify since such advise was unreasonable. Moreover, Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified in her defense and refuted the allegations raised by the state and, more specifically, Zachary Gantt's testimony.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Rule 609, SCRE). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), our Supreme Court held trial counsel was ineffective when he failed to consider the possibility of Foye testifying in his defense given the evidence presented at trial. Foye was charged with trafficking cocaine. Id. at 588, 518 S.E.2d at 266. He was tried jointly with his father. Id. at 591, 518 S.E.2d at 268. After his father told Foye's counsel that he would testify Foye did not know cocaine was in the gym bag, counsel advised Foye not to testify because of his prior convictions. Id. However, at trial, his father testified he told Foye cocaine was in the gym bag as the pair were walking into the hotel to deliver the drugs and that Foye wanted to help his father because he was afraid his father would get hurt. Id. The two passed the bag back and forth before his father insisted Foye should not get involved and took the bag away from him prior to entering the hotel. Id. Foye waited in the lobby while his father delivered the cocaine. Id.

The Court held Foye's counsel was ineffective because he did not consider the possibility of Foye testifying after his father's damaging testimony. Id. at 592, 518 S.E.2d at 268. The

Court concluded "counsel failed to use his discretion in employing an appropriate trial strategy in light of the unexpected testimony." Id. The Court emphasized counsel's admission that it may have been proper to put Foye on the stand after his father's damaging testimony. Id.

In this case, trial counsel was deficient because his advice concerning whether Petitioner should testify was unreasonable. Counsel improperly discouraged Petitioner from testifying because he believed there were only "negative consequences" if she did so. He failed to see the obvious benefits of Petitioner testifying and explaining "her side of the story." Petitioner would have testified that she did not set up the decedent to be robbed and that she was only with the decedent that day because she was helping arrange for the decedent to have sex with Kimberly Lomax for money.

Trial counsel testified that he was concerned that if Petitioner testified she would be cross-examined regarding the surveillance footage from her home, which showed her coming and going from the house several times and on the telephone while the decedent was being held hostage inside. However, Petitioner explained during the PCR hearing that she was terrified of Jeremiah Johnson, one of her codefendants, and that Johnson had repeatedly threatened her, which is why she did not flee her home that day or seek help from law enforcement. Counsel testified that he was also concerned Petitioner would be questioned by the state about whether she could hear the decedent being tortured. However, Petitioner testified during the evidentiary hearing that she was in the living room or on the porch during most of the event and could not hear what was going on in the bedroom. As seen, if Petitioner had testified, she could have refuted the allegations against her and Zachary Gantt's testimony. Consequently, there is a reasonable probability the outcome of Petitioner's trial would have been different but for counsel's unreasonable advice.

Respectfully, this Court should reverse the decision of the PCR court, reverse Petitioner's convictions and sentence, and remand for a new trial.

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. Petitioner ultimately requests this Court reverse her convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kyndra Leann Howell states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on March 3, 2022 before the Honorable William P. Keesley, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Kyndra Leann Howell.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2023.

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Apr 28 2023

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

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ATTORNEY FOR PETITIONER

This 28th day of April, 2023.