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May 26 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

William P. Keesley, Circuit Court Judge

MARY NIMMONS PATRICK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001253

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
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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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel failed to call Derek Green as a witness during Petitioner's jury trial, and where 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 Green had testified that the methamphetamine found in Petitioner's home during the execution of a search warrant belonged to him?

STATEMENT OF THE CASE

On May 11, 2017, officers with the Anderson County Sheriff's Office executed a search warrant at the house Petitioner shared with her now deceased husband, Gary Patrick, and their friend, Derek Green. App. 107, ll. 4-15; App. 117, ll. 13-19; App. 131, ll. 11-15; App. 212, ll. 2-9. Upon entering the home, officers found Petitioner in her bathroom. Petitioner had been preparing to take a bath and was only wearing a shirt and underwear. App. 109, ll. 2-5; App. 113, ll. 15-18; App. 119, ll. 10-13; App. 210, ll. 4-7. She was immediately detained and allegedly given a blanket or a towel to cover up. App. 109, ll. 5-6; App. 210, ll. 4-23. She was escorted to the living room and advised of her *Miranda* rights. App. 109, l. 14 – 110, l. 4; App. 119, ll. 5-22; App. 133, ll. 12-19. No one else was present in the home. App. 118, ll. 21-24.

After officers conducted a protective sweep of the residence, Petitioner was allegedly provided with a pair of shorts that were found in the bathroom she had recently vacated. App. 109, ll. 7-12. A substance, which was later identified as methamphetamine, was found in a pocket of these shorts. App. 158, l. 18 – 159, l. 8; App. 191, ll. 8-19. Petitioner allegedly “took ownership” of the substance found in her shorts. App. 112, ll. 9-16.

As detectives continued to search her residence, Petitioner told Detective Matthew McDonald that she was unaware of any other narcotics inside the home. However, two additional plastic bags containing a substance, which was later identified as methamphetamine, were found in the closet of a secondary bedroom in the house. App. 134, ll. 6-14; App. 137, ll. 1-3; App. 144, l. 24 – 145, l. 2; App. 191, ll. 11-24. After these drugs were located, Detective McDonald claimed Petitioner admitted that an individual named Blake Kelly “provided her with those narcotics.” McDonald claimed Petitioner said Kelly provided her with “roughly” half a pound of methamphetamine “on a consistent basis.” App. 112, l. 17 – 113, l. 1; App. 122, l. 9 –

123, l. 4. The total amount of methamphetamine found in Petitioner's house was 234.11 grams. App. 189, ll. 7-8.

Petitioner testified in her defense and denied knowing there were any drugs in her home. App. 210, ll. 24-25. However, she admitted she told law enforcement that day that the drugs were hers because she was scared, her husband was "real sick," and she did not want him to "get locked up." App. 211, ll. 7-14. Petitioner agreed with anything the officers said because she was naked, only had a small towel that "barely" wrapped around her, and "just wanted to get [her] clothes on." App. 210, ll. 19-23; App. 211, ll. 18-21; App. 227, ll. 4-5; App. 230, ll. 16-21.

An Anderson County grand jury indicted Petitioner on October 17, 2017 for trafficking in methamphetamine. App. 419-420. Her case was called to trial on April 16, 2018 before the Honorable R. Lawton McIntosh, and a jury. App. 1. Assistant Solicitor Chelsey Moore represented the state. App. 1. William Yarborough represented Petitioner. App. 1. On April 18, 2018, the jury found Petitioner guilty as indicted. App. 314, l. 22 – 315, l. 10. She was sentenced to twenty-five years imprisonment and a one hundred thousand dollar fine. App. 317, ll. 9-10.

The Court of Appeals dismissed Petitioner's appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Patrick, 2020-UP-069 (S.C. Ct. App. filed March 11, 2020). On April 2, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 334-339. The state filed a return to this application dated August 24, 2020. App. 340-351. With the assistance of counsel, Petitioner submitted an amended application dated February 25, 2022. App. 352-353. An evidentiary hearing was convened on March 1, 2022 before the Honorable William P. Keesley. App. 354. Assistant Attorney General Taylor Z. Smith represented the state. App. 355. Sarah M. Henry represented Petitioner. App. 355.

Petitioner testified at the PCR hearing that the majority of the methamphetamine found in her home during the execution of the search warrant was located in the closet of the bedroom Derek Green was using. App. 364, l. 15 – 365, l. 12. She admitted she told the detectives that the drugs were hers because she was naked, was repeatedly questioned by the officers, and was told she would not be permitted to put her clothes on until she “got done answering their questions.” App. 367, ll. 2-15. Petitioner was questioned for over an hour and was only given a small towel to cover up with. App. 368, ll. 2-20.

Petitioner explained that she told trial counsel that the drugs belonged to Derek Green, who often lived in her house. App. 369, l. 17 – 370, l. 11. Green met with Petitioner’s trial counsel and admitted to counsel that the drugs were his. Green asked counsel what would happen if Green went to court and told the truth. Trial counsel told Green “he better have a good lawyer.” App. 371, l. 25 – 372, l. 14. Despite Green’s admission that the methamphetamine found in Petitioner’s house belonged to him, trial counsel did not subpoena Green to testify at Petitioner’s trial. App. 373, ll. 19-21. Petitioner was unsure whether Green would have testified before her jury that the drugs were his because trial counsel’s remark that Green “better have a good lawyer” “really scared” Green. App. 374, l. 21 – 375, l. 1. Regardless, Petitioner was confident that if Green was called to testify at her trial and truthfully told the jury that the drugs were his, the outcome of her trial would have been different. App. 375, ll. 7-13.

William Yarborough, Petitioner’s trial counsel, testified that Petitioner wanted somebody else to take responsibility for the drugs found in her house. App. 383, ll. 1-3. Occasionally, Petitioner would bring people to Yarborough’s office who she said would take responsibility for the drugs. App. 382, ll. 8-16. For example, Petitioner brought Derek Green to the office. Green asked Yarborough what would happen if Green admitted the drugs belonged to him.

Yarborough agreed that he told Green he “better get a lawyer if that” was what he planned to do. App. 382, ll. 17-24. However, Green never said the drugs were his and was “not very cooperative when” it got close to trial. App. 385, ll. 21-25; App. 386, ll. 10-19. Despite Petitioner’s desires, no one would come to court and take responsibility for the drugs. App. 383, ll. 1-3.

By order filed August 15, 2022, the PCR judge denied Petitioner relief. App. 401-418. He found Petitioner failed to prove trial counsel was ineffective for not calling Derek Green as a witness at trial. App. 415. The judge emphasized counsel’s testimony that Green never claimed responsibility for the drugs, although Petitioner had wanted him to do so. App. 415. Given these circumstances, the judge determined trial counsel’s decision not to call Green as a witness “was reasonable under prevailing professional norms.” App. 415. Moreover, the judge concluded Petitioner failed to prove there is a reasonable probability the outcome of her trial would have been different if Green had testified since Petitioner did not present Green’s testimony at the PCR hearing. App. 415-416.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by trial counsel’s failure to call Derek Green as a witness at trial and where there is a reasonable probability the outcome of Petitioner’s trial would have been different if Green had testified and admitted the methamphetamine found in Petitioner’s house was his, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel failed to call Derek Green as a witness during Petitioner's jury trial, and where 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 Green had testified that the methamphetamine found in Petitioner's home during the execution of a search warrant belonged to him.

Trial counsel was ineffective for failing to call Derek Green as a witness during Petitioner's jury trial. At the time law enforcement executed the search warrant at Petitioner's house and ultimately discovered a large quantity of methamphetamine, Green lived in the house with Petitioner and her husband, Gary Patrick. Most of the methamphetamine was found in the closet of Green's bedroom. Trial counsel met with Green prior to trial, but failed to call him as a witness. 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 Green had testified and taken responsibility for the drugs found in the home.

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).

Petitioner testified at the evidentiary hearing that she told trial counsel the drugs belonged to Derek Green, who often lived in her house. App. 369, l. 17 – 370, l. 11. According to Petitioner, Green met with counsel before trial and took responsibility for the drugs. App. 371, l. 25 – 372, l. 14. Despite Green's admission that the methamphetamine found in Petitioner's home belonged to him, trial counsel did not subpoena Green to testify at Petitioner's trial nor called him as a witness. App. 373, ll. 19-21. This constitutes deficient performance. Any reasonably competent criminal defense attorney would have called Green to testify in Petitioner's defense.

Petitioner was prejudiced by trial counsel's deficient performance because there is a reasonable probability the outcome of her trial would have been different if Green had told the jury that the methamphetamine found in Petitioner's home during the execution of the search warrant belonged to him, particularly given that most of the drugs were found in the closet of the bedroom Green used when he stayed at the house. Green's testimony likely would have led to Petitioner being acquitted of trafficking in methamphetamine or at a minimum reduced the weight of the methamphetamine the jury found Petitioner possessed.

Respectfully, this Court should reverse the decision of the PCR judge denying Petitioner relief, reverse Petitioner's conviction, 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 conviction and sentence and remand for a new trial.

Respectfully submitted,

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

ATTORNEY FOR PETITIONER

This 26th day of May, 2023.

STATE OF SOUTH CAROLINA
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mary Nimmons Patrick 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 1, 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 Mary Nimmons Patrick.

Respectfully Submitted,

s/ Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of May, 2023.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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

South Carolina Commission on Indigent
Defense

Division of Appellate Defense

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Columbia, SC 29211-1589

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ATTORNEY FOR PETITIONER

This 26th day of May, 2023.