

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

JUL 17 2013

S.C. Supreme Court

JIMMY D. PORTEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213469

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION9

ISSUE PRESENTED

Whether Petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to object to inadmissible hearsay statements in his trial for armed robbery which constituted the only evidence that petitioner had a gun?

STATEMENT

In January and February, 2007, petitioner was indicted by a Richland County grand jury for armed robbery, two counts of assault and battery of a high and aggravated nature, and failure to stop for a blue light. App. 774 – 83. On September 2 – 4, 2008, petitioner was tried before the Honorable G. Thomas Cooper, Jr. and a jury. App. 1. Vanessa Cooper Shipley and Anna Good represented the State. App. 1. James Cooper and Casey Secor represented petitioner. App. 1. The jury convicted petitioner on all charges. App. 610, l. 17 – 611, l. 11. Judge Cooper sentenced him to life without parole based on South Carolina’s recidivist statute. App. 621, l. 2 – 623, l. 4; see also S. C. Code Ann. § 17-25-45. Petitioner’s conviction was affirmed on appeal. App. 646 – 653.

On November 19, 2010, petitioner filed a PCR application. App. 654 – 660. On September 10, 2012, a hearing was held before the Honorable J. Ernest Kinard, Jr. App. 669. David E. Belding represented petitioner. App. 669. Robert D. Corney represented the State. App. 669. On November 19, 2012, Judge Kinard denied petitioner’s PCR application. App. 756 – 773. This petition follows.

ARGUMENT

Petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to object to inadmissible hearsay statements in his trial for armed robbery which constituted the only evidence that petitioner had a gun.

Factual and Procedural Background

On November 9, 2006, a Family Dollar store in Richland County was robbed. App. 775. The store manager, Tracey Anderson ("Anderson"), testified that she saw the hood of a white car when she was preparing to open the store. App. 252, ll. 6 – 14. She claimed to see an African-American man walking to the front door and checking the store hours. App. 252, l. 17 – 253, l. 5. A man wearing a mask entered the store. App. 224, ll. 8 – 15. The man demanded the store's money and threatened to kill her and the store's other employee. App. 227, ll. 9 – 16. Anderson claimed to see a bulge in the pocket of the man's jacket. App. 227, ll. 17 – 22. She gave the man the money and he fled the store. App. 232, ll. 4 – 11.

Anderson told the police the man who robbed her was white and that he had "a Middle Eastern or Pakistani accent." App. 234, ll. 18 – 23; App. 257, ll. 20 – 23. Petitioner is African-American. App. 720, ll. 3 – 7. Anderson did not see the robber get into a car. App. 256, ll. 7 – 12. Neither Anderson nor any of the other witnesses who testified at trial saw a weapon during the robbery. Anderson was only able to identify petitioner as the robber after the police conducted a "show up" identification where they drove Anderson to see petitioner handcuffed and in custody. App. 258, l. 10 – 262, l. 10.

On direct-examination, Anderson claimed that a minister named Michael Murphy came into the store after the robbery. App. 232, l. 23 – 233, l. 10. Anderson testified, "that's when [Rev. Murphy] ran around to the back to see the robber, and that's when he identified the car and that's

when he said the robber pulled out a pistol on him.” App. 233, ll. 2 – 7. Anderson also told the jury that “we all” had to write a statement for the police, which included Rev. Murphy. App. 235, ll. 6 – 12. The sheriff’s deputy who arrived on the scene testified that he interviewed Rev. Murphy and that he worked with a church that was near the Family Dollar. App. 313, ll. 11 – 20. Trial counsel did not object to this testimony.

An investigator testified later in the trial that they received a statement from Rev. Murphy. App. 512, ll. 17 – 24. When the solicitor asked the investigator where Rev. Murphy worked, the investigator began to respond that he worked at the church next to the Family Dollar when trial counsel objected. App. 512, l. 25 – 513, l. 10. Trial counsel objected on relevance and hearsay grounds. App. 513, ll. 2 – 19. The objections were overruled. App. 513, l. 2 – 514, l. 3.

On appeal, petitioner contended that he should have been granted a directed verdict because there was insufficient proof that he was armed with a deadly weapon. App. 650. In affirming the trial court, the Court of Appeals specifically credited the hearsay statements of Rev. Murphy claiming to see petitioner with a pistol. App. 648, 652. The Court of Appeals stated, “Additionally, there is evidence [petitioner] used a gun during the robbery, as the minister who ran after [petitioner] following the incident inside the store stated the man pulled a pistol on him.” App. 652.

The PCR court ruled that petitioner could not demonstrate that trial counsel was ineffective for failing to object to the hearsay statements of Rev. Murphy. App. 762 – 64. The PCR court held that trial counsel had a “reasonable and valid trial strategy” for failing to object to Rev. Murphy’s statements. App. 763. The PCR court credited trial counsel’s testimony that they intentionally decided not to object to the hearsay statements because they knew that Rev. Murphy would not testify. App. 763. Trial counsel’s strategy was to “punch holes” in the State’s case with the idea that it would look bad for the State to not present such an important witness. App. 763.

Discussion

In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. See Strickland v. Washington, 466, U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court erred in finding trial counsel's strategy was reasonable. In Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), the Court reversed and remanded for a new trial because trial counsel failed to object to the admission of an unrelated firearm into evidence. The Court stated, "We hold that the failure to object to this clearly inadmissible evidence was ineffective assistance of counsel. We reject the suggestion that the failure to object to the unrelated pistol can be justified as a valid trial strategy." Id. at 493, 674 S.E.2d at 172.

This case is also similar to Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). In Dawkins, trial counsel failed to object to inadmissible hearsay statements that bolstered the victim's credibility in a criminal sexual conduct case. Id. at 155-57, 551 S.E.2d at 262-63. Trial counsel claimed he made a strategic decision not to object. Id. The Court rejected trial counsel's claimed strategy. Id. The Court held that the failure to object and exclude inadmissible hearsay prejudiced the applicant and remanded for a new trial. Id.

Rev. Murphy's statements were inadmissible hearsay. SCRE 801(c). They were out-of-court statements made by someone other than the declarant. Rev. Murphy's statements were

offered for the truth of the matter asserted: that the robber had a pistol. SCRE 801(c). These statements were the only evidence that petitioner had a firearm. No firearm was found when petitioner was arrested or was ever admitted into evidence.

At the PCR hearing, trial counsel claimed they intentionally decided not to object to Rev. Murphy's testimony because it would allow them to argue to rhetorically ask the jury why the State did not call Rev. Murphy if he was such an important witness. App. 739, ll. 4 – 14; App. 745, l. 3 – 746, l. 2. This "strategy" is unreasonable on its face. Trial counsel acknowledged that the testimony about a gun was important and came from "a supposedly credible minister." App. 739, ll. 4 – 14. Failing to exclude the only evidence of a firearm in an armed robbery case—especially if such evidence comes from a minister—is not a reasonable trial strategy.

The inefficacy of this purported strategy is demonstrated by trial counsel's own lack of faith in their plan. When the solicitor asked a police officer where Rev. Murphy worked, trial counsel objected. App. 513, ll. 2 – 19. Despite their claimed strategy not to oppose evidence regarding Rev. Murphy, trial counsel made this objection on hearsay and relevance grounds. App. 513, ll. 2 – 19. This objection was made after Anderson told the jury that Rev. Murphy was a minister and that he claimed to have seen a pistol. App. 233, ll. 1 – 10. Because this strategy was not reasonable and trial counsel did not even act in accordance with their own strategy, the trial court erred in finding their performance was not deficient.

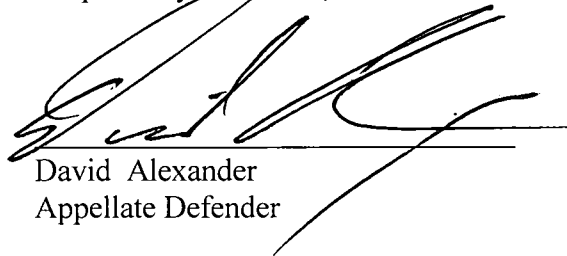
Petitioner was prejudiced by the admission of Rev. Murphy's hearsay statements. The admission of prejudicial evidence "undermines confidence in the outcome of the trial." Holman at 493, 674 S.E.2d at 172. The statements by a minister that petitioner had a gun certainly increased the probability of a conviction on the armed robbery charge. The Court of Appeals specifically referenced Rev. Murphy's statements when it affirmed the denial of petitioner's motion for a

directed verdict. Had Rev. Murphy's statements about a gun been excluded, there is a reasonable probability that the result of the proceeding would have been different. See Cherry at 117, 386 S.E.2d at 625.

CONCLUSION

For the foregoing reasons, the Court should grant the petition with the ultimate relief of a new trial on all charges.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and cursive.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 17 2013

Certiorari to Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

S.C. Supreme Court

JIMMY D PORTEE,

PETITIONER,

V.

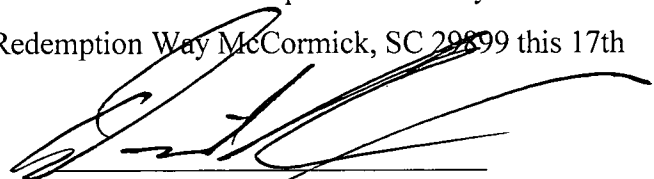
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213469

CERTIFICATE OF SERVICE

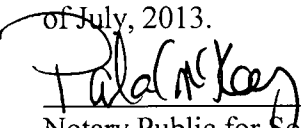
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Robert D. Corney, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Jimmy D. Portee 145122 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 17th day of July, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of July, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.