

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Dec 11 2023
S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Perry H. Gravely, Circuit Court Judge

JACORY FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000875

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 failed to properly impeach Regina Foster, the state's key witness, with the prior inconsistent statements she gave law enforcement after her arrest since there is a reasonable probability the outcome of Petitioner's trial would have been different if Foster had been properly impeached?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner conspired with Derrick Bennett and Regina Foster to lure Kiyounnie Jackson to an abandoned house for a fake marijuana deal in order to rob him. App. 58, l. 13 – 60, l. 13. Bennett dated Foster's sister, Reyna Jefferies. App. 130, l. 22 – 131, l. 7. Foster never met Petitioner before the night of the shooting. App. 131, ll. 8-10.

Foster had known the decedent, Jackson, for eight years. App. 133, ll. 5-6. Jackson sold her marijuana. App. 132, l. 25 – 133, l. 1. According to Foster, Bennett and Petitioner directed her to log into Facebook and message Jackson to come sell her weed. App. 133, l. 11 – 135, l. 25. She used Petitioner's phone to log into Facebook and Bennett told her what to write. App. 134, l. 24 – 135, l. 6; App. 157, ll. 4-6. Foster said she did not want to participate, but "was scared." App. 136, ll. 1-8.

Through Foster's Facebook account, Jackson was told to come to an abandoned house. App. 136, l. 9 – 137, l. 8. Foster, Petitioner, and Bennett drove to the house in a red car. App. 137, ll. 15-21. Petitioner's grandmother owned a burgundy Nissan Altima. App. 189, ll. 9-13. Petitioner and Bennett went in first through the back and let Foster in through the front door. App. 137, ll. 9-17. They waited on Jackson and directed him to the abandoned house when he arrived. App. 139, l. 3 – 140, l. 22.

Foster opened the door for Jackson and ran to the bathroom. App. 141, l. 3 – 141, l. 7. Petitioner was in a bedroom next to the bathroom and Bennett was in another room. App. 141, ll. 10-15. According to Foster, both had pistols. App. 141, ll. 16-20. Foster did not know if Jackson had a gun. App. 141, ll. 21-22.

Foster heard Jackson call her name followed by gunshots. App. 142, ll. 2-3. She then heard "scattering and scuffling, and then it was silent." App. 142, ll. 5-8. Foster waited in the

bathroom for about seven minutes, then emerged to find Jackson on the floor. App. 142, l. 16 – 143, l. 8. She ran out the front door and the red car in which they arrived was gone. App. 143, ll. 9-25.

A friend picked up Foster and took her to an apartment with Petitioner and Bennett. App. 144, l. 16 – 145, l. 12. “[E]verybody was just acting weird” and “freaking out.” App. 145, ll. 9-14. They eventually made their way to Petitioner’s girlfriend’s apartment and Foster’s sister took Foster’s clothes and iPad and burned them. App. 148, l. 1 – 149, l. 4; App. 151, ll. 11-14. Foster claimed to see Bennett and Petitioner split up money. App. 149, l. 11 – 150, l. 11. Bennett had a gun he took from Jackson. App. 150, ll. 12-24.

Foster, her sister, and Bennett then left Petitioner and went to Jonesville in Union County. App. 152, ll. 4-17. Bennett told Foster’s sister that he was going to have to kill Foster. Foster’s sister gave her a phone and Foster texted her mom for help. App. 152, ll. 13-17. The police entered the trailer in Jonesville and apprehended Foster, her sister, and Bennett. App. 207, l. 4 – 208, l. 22. The police took a firearm from Bennett, but it was not the gun that fired the shots that killed Jackson. App. 208, ll. 2-22.

Foster’s sister, Reyna Jeffries, testified that Bennett and Petitioner left that night and when they returned they were “in a panic.” App. 168, l. 14 – 169, l. 5. A friend went to pick up Foster. App. 169, l. 9 – 170, l. 11. They went to Petitioner’s girlfriend’s apartment. App. 170, l. 14 – 171, l. 5. Jeffries saw posts on Facebook about Jackson and asked Petitioner what happened. App. 171, ll. 6-17. Jeffries claimed Petitioner then volunteered that he shot Jackson. App. 171, ll. 6-17. Takesha Meadors, who was briefly part of the group that evening, claimed Petitioner only responded to her, “Shots fired.” App. 183, ll. 10-16. Jeffries burned Foster and

Petitioner's clothing and threw a gun down a manhole. App. 172, ll. 1-14. The state charged Jeffries with accessory after the fact to both murder and armed robbery. App. 175, ll. 2-4.

Petitioner testified in his own defense. App. 227, l. 21. Petitioner and Bennett hung out that day smoking marijuana. App. 230, l. 19 – 231, l. 7. Petitioner met Bennett through his brother and had only known him for a couple of weeks. App. 230, ll. 20-24. Petitioner knew that Bennett had a reputation for robbing people and “doing all type of crazy things.” App. 235, ll. 18-20.

Bennett and Petitioner ran out of weed and Bennett started trying to find more. App. 231, ll. 11-17. While riding around in Petitioner's grandmother's car, they saw Foster walking by a mailbox. App. 234, ll. 8-17. Bennett told her to get into the car and she did. App. 234, ll. 11-21. Petitioner had never met Foster before that night. App. 234, ll. 22-24.

Bennett told Foster to contact Jackson and Foster began texting him. App. 235, ll. 2-17. They drove straight to the abandoned house. App. 234, l. 25 – 235, l. 1. Everything Foster did, she did only at Bennett's instructions. App. 235, ll. 10-17. Petitioner had never heard of Jackson before that day. App. 236, ll. 1-2.

When they got to the abandoned house, they climbed in a back window. App. 236, l. 25 – 237, l. 3. Petitioner said he thought they went to the house to buy weed from Jackson, but Bennett then decided he was going to rob Jackson. App. 237, ll. 16-21. Petitioner was unarmed and never intended to rob or kill anyone. App. 237, ll. 10-15. When Jackson arrived, he heard Jackson calling Foster's name and then saw him walking in the hallway. App. 238, ll. 2-14. Petitioner then heard gunshots, but did not see Bennett shoot Jackson. App. 238, l. 12 – 239, l. 2. Bennett started going through Jackson's pockets and Petitioner jumped out the window and ran back to the car. App. 239, ll. 3-10.

Petitioner went to the first apartment and then took everyone to his girlfriend's apartment. App. 240, l. 1 – 241, l. 11. Bennett still had his gun and another gun that he took off Jackson. App. 240, ll. 18-24. Bennett tried to give Petitioner money, but Petitioner refused, saying, "I don't want none of it." App. 242, ll. 6-17.

Trial counsel argued during his closing that Petitioner was merely present during the robbery and murder. App. 267, l. 22 – 268, l. 2. The jury deliberated for nearly five hours and asked to be recharged on the law pertaining to each offense as well as accomplice liability. App. 300, l. 17 – 305, l. 18. The jury ultimately found Petitioner guilty of murder, armed robbery, and associated weapon charges. App. 306, l. 12 – 307, l. 11.

A Spartanburg County grand jury indicted Petitioner in May 2018 for murder, armed robbery, and possession of a weapon during the commission of a violent crime, and in May 2019 for use of a person under eighteen to commit a violent crime. App. 434-437. His case was called to trial on October 21, 2019 before the Honorable J. Derham Cole, and a jury. App. 1. Assistant Solicitors Derrick Balsa and Lauren Brown represented the state. Brendan Delaney represented Petitioner. App. 1.

On October 24, 2019, the jury acquitted Petitioner of use of a person under eighteen to commit a violent crime, but found him guilty of murder, armed robbery, and the associated weapons offenses. App. 306, l. 12 – 307, l. 11. Petitioner was sentenced to life without parole for murder, thirty years for armed robbery, and five years for the weapons offense. App. 309, l. 15 – 310, l. 8.

The Court of Appeals affirmed Petitioner's convictions after a review pursuant to Anders v. California, 386 U.S. 738 (1967). App. 328-329. On April 29, 2022, Petitioner filed an application for post-conviction relief (PCR). App. 330-336. The state filed a return to this

application on July 5, 2022. App. 337-349. With the assistance of counsel, Petitioner filed an amended application on February 1, 2023. An evidentiary hearing was convened on April 18, 2023 before the Honorable Perry H. Gravely. App. 350. Assistant Attorney General Andrew Cole represented the state. App. 350. Susannah Ross represented Petitioner. App. 350.

Petitioner testified at the evidentiary hearing that trial counsel was ineffective for failing to properly impeach Regina Foster, the state's key witness, with the prior inconsistent statements she gave law enforcement after her arrest. Foster gave four different statements. Petitioner testified that trial counsel should have used the inconsistencies in each of these statements and her testimony before the jury to attack her credibility. App. 360, ll. 13-19.

Petitioner explained that in her previously recorded and written statements, Foster blamed everything on Petitioner. For example, Foster said Petitioner "was the one calling the shots" and Petitioner was the person who shot Jackson. However, during her testimony before the jury, Foster said Bennett directed her what to do and she did not know who of the two, Bennett or Petitioner, shot Jackson. App. 354, l. 16 – 355, l. 5; App. 362, ll. 9-19. Petitioner asserted, "I just don't understand how she can state in the beginning that it was all me but then on trial she change it up and that was used against me." App. 356, ll. 11-13.

On cross-examination, Petitioner denied that it was better Foster told the jury that she did not know who the shooter was than for her to testify that Petitioner was the shooter, which was consistent with her statement to police. Petitioner asserted the change in her statement made her not credible. App. 366, l. 17 – 368, l. 23.

Brendan Delaney, Petitioner's trial counsel, testified that he pointed out some of Foster's prior inconsistent statements about Petitioner's involvement during cross-examination. He

explained that Foster ultimately testified that she did not know who shot Jackson and that she did not see the shooter. App. 387, ll. 12-23.

By order filed May 12, 2023, the PCR judge denied Petitioner relief. App. 410-432. The judge found Petitioner failed to prove that trial counsel's cross-examination of Regina Foster "was not reasonable under the prevailing professional norms." App. 425. The judge emphasized that "counsel pointed out Foster's possible biases and her possible collusion with Bennett and with other witnesses." App. 425.

Because Petitioner's right to the effective assistance of counsel was violated when trial counsel failed to properly impeach Regina Foster with the prior inconsistent statements she gave law enforcement after her arrest and since there is a reasonable probability the outcome of Petitioner's trial would have been different if Foster had been properly impeached, 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 failed to properly impeach Regina Foster, the state's key witness, with the prior inconsistent statements she gave law enforcement after her arrest since there is a reasonable probability the outcome of Petitioner's trial would have been different if Foster had been properly impeached.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly impeach Regina Foster, the state's key witness, with the prior inconsistent statements she gave law enforcement after her arrest since there is a reasonable probability the outcome of Petitioner's trial would have been different if Foster had been properly impeached.

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 Regina Foster gave four different statements to law enforcement after her arrest. She also testified before the jury and was the main witness against Petitioner since she admitted being involved in setting up the robbery and being present in the abandoned house when the robbery and murder occurred. Petitioner explained that in her prior statements, Foster placed all the blame on Petitioner and claimed Petitioner was the shooter. However, during her testimony before the jury, Foster claimed Bennett directed her what to do and she did not know who the shooter was, Bennett or Petitioner, because she was in a different room when the shooting occurred. Trial counsel was ineffective for failing to draw out these inconsistencies during his cross-examination of Foster. Any reasonably competent criminal defense attorney would have impeached the state’s key witness with the inconsistencies in her prior statements.

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 counsel had properly impeached Foster’s credibility. Her credibility was essential to the state’s case against Petitioner and if her credibility had been attacked, the jury likely would have acquitted Petitioner based on his mere presence at the scene.

Respectfully, this Court should hold the PCR judge erred by denying Petitioner relief, reverse Petitioner’s convictions, 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 his convictions and sentence and remand for a new trial.

Respectfully submitted,

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

ATTORNEY FOR PETITIONER

This 11th day of December, 2023.

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Counsel for Jacory Sharod Foster 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 April 18, 2023 before the Honorable Perry H. Gravely, 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 Jacory Sharod Foster.

Respectfully Submitted,

s/ Lara M. Caudy _____

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of December, 2023.

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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_____

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This 11th day of December, 2023.