

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Circuit Court Judge

RECEIVED

JUL 26 2013

S.C. Supreme Court

JAMES IVAN AIKEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000083

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUE PRESENTED

1. The PCR court erred in failing to find trial counsel ineffective for not objecting to testimony by Morrison, whose home was allegedly burglarized by the petitioner, concerning his missing wallet. Petitioner was not charged with stealing the missing wallet so the testimony was prejudicial to petitioner because the state argued in his closing that the missing wallet was evidence that petitioner intended to rob Morrison.

2. The PCR court erred in failing to find trial counsel ineffective for making the improper comment in her closing argument that in a popularity contest, the jury would find Morrison more likeable than her client, Petitioner Aiken, and for telling the jury that Aiken returned the shoe expecting to receive a reward which painted Aiken in a bad light.

STATEMENT

In May 2010, the Charleston County Grand Jury indicted James Ivan Aiken on the charge of burglary first degree. On January 18-19, 2011, Aiken proceeded to trial before the Honorable R. Markley Dennis and a jury. Aiken was represented by Mary Beth Mulvaney and Lori Proctor, and the state was represented by Michael Nelson and Chad Simpson. The jury returned a verdict of guilty. Judge Dennis sentenced Aiken to twenty years. App. 297, ll. 13 – 25.

Aiken 's attorney filed a notice of appeal. On August 11, 2011, Aiken signed an affidavit dropping his direct appeal. App. 300. On September 2, 2011, the South Carolina Court of Appeals issued an Order dismissing Aiken's direct appeal. App. 301.

On October 13, 2011, Aiken filed an application for post-conviction relief (PCR). The state filed a return on February 13, 2012. An evidentiary hearing was held on December 5, 2012 before the Honorable Roger M. Young, Sr. Aiken was represented by Justin Bamberg, and the state was represented by Ashleigh Wilson. On December 31, 2012, Judge Young issued an order denying Aiken's PCR application and dismissing it with prejudice. App. 512 – 527. Aiken's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to testimony by Morrison, whose home was allegedly burglarized by the petitioner, concerning his missing wallet. Petitioner was not charged with stealing the missing wallet so the testimony was prejudicial to petitioner because the state argued in his closing that the missing wallet was evidence that petitioner intended to rob Morrison.

On January 16, 2010, James Aiken entered the bedroom of Michael Morrison in his home in downtown Charleston about eight o'clock in the morning to return a leopard print high heeled shoe that Aiken found in the front yard of the home. App.94, ll. 3 – Ap. 95, ll. 12. Morrison woke up when he heard someone moving things on his dresser. Aiken left the house and Morrison followed him calling 911 as he did. The police arrived and Aiken was arrested. Aiken told the police that he went into Morrison's home to return the shoe to him. The police arrested him and charged him with burglary. App. 95, ll. 13 – App. 96, ll. 24; App. 100, ll. 4 – App. 111, ll. 25.

When he was arrested, Aiken had a plastic bag with some clothing and homemade cards but no items that belonged to Morrison. App. 111, ll. 4 – 18; App. 415, ll. 1 – 6.

Later that day, Morrison realized his wallet was missing. He usually put it on his dresser and said he did the night before. He called the police and told them his wallet was missing. He asked his roommate if she had seen it. She told him maybe he had misplaced it somewhere, but he said no. He never saw his wallet again. Defense counsel made no objections to the testimony about the wallet. App. 112, ll. 8 – App. 114, ll. 16.

On cross examination, defense counsel asked Morrison no questions concerning the missing wallet. App. 114, ll. 21 – App. 126, ll. 21.

In his closing argument, the solicitor argued to the jury:

How many opportunities in a quarter of a mile, including those time periods when Mr. Aiken was out of sight, was there to see how things are going: 'I'm just caught in the act red-handed. I need to get rid of this wallet.'

So the missing wallet is certainly evidence for you to consider. However, the law does not require that the state prove to you that the wallet was taken. The crime of burglary requires entering the house with the intent to commit a crime, as the judge will instruct you on the law. It does not require that the person completed the crime.

Defense counsel made no objection. App. 247, ll. 14 – 25; App. 248, ll. 1-2.

At his PCR hearing, Aiken's mother, Cora Aiken, and a neighbor, Leon Goodwin who did not know Aiken, testified about an incident that occurred about one week earlier on January 9, 2010. Mr. Goodwin said that about 9:00 in the morning on January 9, 2010, he was outside and saw the front door open at the house of his neighbors, Mari and John. He went over and called them but no one was at home. Mr. Goodwin then called the police who came and investigated. App. 361, ll. 15 – App. 363, ll. 7.

Ms. Aiken said she and the petitioner had gone to the store when this incident happened. When they returned home and learned of the incident, Ms. Aiken said to her son: "Wow, that's such a nice neighbor to call the cops out of concern. If anything like that happens to me, I certainly hope someone would do the same for me." App. 363, ll. 11 – App. 366, ll. 7.

Aiken testified at his PCR hearing that he went into Morrison's to return the shoe because of what his mother said about helping people and being a nice neighbor. He told his attorney he wanted to testify so the jury would hear the reason he went into the home instead of the jury concluding he was using the shoe as a "ruse." He asked his trial counsel to present this defense, but she did not. App. 445, ll. 7 – App. 447, ll. 3.

Aiken's trial counsel testified that she did not object to Morrison's testimony about the wallet because she thought there was no legal basis to object to it. However, she agreed that if she

had objected, and the judge sustained the objection, the jury would not have been able to consider the missing wallet. She also agreed that if she had objected and the judge ruled against her, the issue would have been preserved for appellate review. App. 368, ll. 8 – App. 370, ll. 13.

Trial counsel agreed that the state used the missing wallet as evidence of Aiken’s criminal intent to the state’s advantage. App. 370, ll. 19 – ll. 22; App. 382, ll. 24 – App. 383, ll. 7. Trial counsel also agreed that the testimony about the missing wallet was “severely” prejudicial to Aiken since this was a burglary charge. App. 371, ll. 17 – App.372, ll. 1.

Trial counsel represented Aiken at his preliminary hearing. At that hearing, Officer Duren testified that he did not charge Aiken with the missing wallet, because he could not tell if Morrison had misplaced the wallet or if it was never on his person. App. 372, ll. 2 -4; App. 374, ll. 1 – 24; Exhibit 2 Preliminary Hearing- App. 466 – 470

The PCR judge ruled that he found Aiken’s testimony to not be credible while he found trial counsel’s testimony to be credible. The PCR judge found that Aiken did not meet his burden of proof in proving that trial counsel should have moved to exclude or object to testimony regarding Morrison’s missing wallet. The PCR court found there was no legal basis to object to the testimony concerning the wallet. App. 521.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant 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. 117-118, 386 S.E.2d 624 (1989).

Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

In State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996), the Supreme Court ruled that a contemporaneous objection is required at trial to preserve an issue for appellate review. Trial counsel was ineffective for not objecting to testimony about the missing wallet. The wallet was not in evidence yet the solicitor argued in his closing that it was evidence of criminal intent which was a necessary element to prove burglary first degree. The fate of the wallet as loot from the burglary was entirely speculative. By not objecting, counsel denied Aiken the opportunity for an appellate court to review this issue.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for making the improper comment in her closing argument that in a popularity contest, the jury would find Morrison more likeable than her client, Petitioner Aiken, and for telling the jury that Aiken returned the shoe expecting to receive a reward which painted Aiken in a bad light.

In her closing argument, petitioner's trial counsel told the jury that Morrison said he did not remember whether the door was shut or open because somebody went out that morning to get the paper. Counsel said:

And Mr. Aiken thinks, 'you know what? I'll return this shoe to someone in the house and I'll tell them, you know, your door's open. And maybe, maybe, they'll give me dollar or two. Maybe I'll get a tip. So that's what I'll do.'

App. 250, ll. 5 – App. 251, ll. 15.

Later in her closing argument, counsel said to the jury:

This case is not a popularity contest between Mr. Morrison or Mr. Aiken. It's not about who is more likeable. Because if it's about who is more likeable, then Mr. Morrison wins.

App. 257, ll. 21 – 25.

At his PCR hearing, Aiken testified that the closing arguments that trial counsel used at trial were prejudicial to him because they painted him in a "real bad light." He never told her that was the reason he entered the residence. App. 458, ll. 3 – 23.

Trial counsel admitted that she made those comments during closing argument. However, she did not believe it was prejudicial to her client to tell the jury that her client was not likeable. She believed it helped her client because it helped her have credibility with the jury. App. 409, ll. 14 - - App. 412, ll. 24.

The PCR judge ruled that Aiken did not meet his burden in proving that trial counsel had made improper comments during her closing argument. The PCR court found that counsel's comments were proper and supported the defense presented at trial that Aiken did not have the criminal intent to commit burglary. App. 524.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

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In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court held that trial counsel was ineffective for improper comments made during closing argument, and reversed the case for a new trial. Trial counsel in Lounds' case damaged the defense case because the closing argument did not support petitioner's account of what happened. Lounds' counsel also pounded his fist while describing when the defendant brought another person tube the muscle when he was going to ask the victim for money. This showed that Lounds used force which was an element of kidnapping for which Lounds was on trial.

Aiken's attorney showed Aiken in a bad light. These comments showed Aiken as an opportunist trying to make money which supported the element of intent for burglary if he were that desperate for money.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentence reversed,
and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Roger M. Young, Circuit Court Judge

JAMES IVAN AIKEN,

PETITIONER,

V.

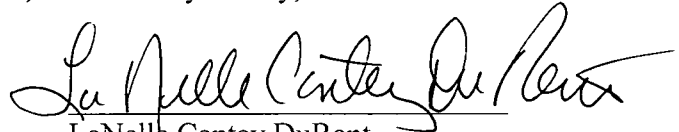
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000083

CERTIFICATE OF SERVICE

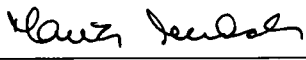
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of July, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of July, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.