

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED

AUG 02 2013

SC Court of Appeals

STANLEY WISE,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-158727

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did trial counsel render ineffective assistance of counsel when he did not object to a transcript of a State's witness's testimony being sent into the jury room during deliberations?

STATEMENT

In May of 1995, the Spartanburg County Grand Jury indicted Wise for two counts of assault and battery with intent to kill [ABWIK], three counts of possession of a weapon during the commission of a violent crime and one count of murder, indictments #1995-GS-42-3513, 3514, 3515. On July 15, 1995, Wise proceeded to jury trial before the Honorable J. Derham Cole. Attorney Tom Dillard represented Wise at trial. The jury returned verdicts of guilty and Judge Cole sentenced Wise to twenty (20) years for each of the ABWIK charges, five (5) years for the two related weapons charges, life for murder and a consecutive five (5) years for the remaining weapons charge. An appeal was perfected and on August 13, 1997, the South Carolina Court of Appeals dismissed the appeal. State v. Wise, Op.No 97-MO-086 (S.C.Ct.App. filed August 13, 1997).

On September 9, 1997, Wise filed an application for post conviction relief. On January 9, 2001, an evidentiary hearing was held before the Honorable John C. Hayes, III. Attorney James Spears represented Wise at the PCR hearing. In an order signed January 24, 2001, Judge Hayes granted post conviction relief and ordered a new trial. The State appealed. On April 7, 2003, the South Carolina Supreme Court dismissed the appeal. Wise v. State, Op. No. 2003-MO—29 (S.C. Supreme court, filed April 7, 2003).

On October 8, 2004, Wise proceeded to jury trial a second time, before the Honorable James E. Lockemy. Attorney Thomas A.M. Boggs represented Wise at trial. Attorney Robert Coler prosecuted the case. The jury again returned verdicts of guilty. Judge Lockemy sentenced Wise to twenty (10) years for each of the ABWIK charges, five (5) years for the three weapons charges and life for murder, all sentences to run concurrently. An appeal was perfected and on January 2, 2008, the South Carolina Court of Appeals dismissed the appeal. State v. Wise, Op.No. 2008-UP-001 (S.C.Ct.App. filed January 2, 2008).

On May 15, 2008, Wise filed an application for post conviction relief. The State filed a return on November 5, 2008. On April 8, 2009, an evidentiary hearing was held before the Honorable Roger L. Couch. Attorney Ryan Langley represented Wise at the PCR hearing. Attorney Michelle Parson Kelley represented the State. In a written order filed March 17, 2010, Judge Couch denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 16, 2010, and the petition for writ of certiorari was filed on October 21, 2010. The State filed a return on February 4, 2011. On April 3, 2013, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

Trial counsel rendered ineffective assistance of counsel when he did not object to a transcript of a State's witness's testimony being sent into the jury room during deliberations.

A jury convicted petitioner after trial and the judge sentenced him to life in prison. This was petitioner's second trial as his first trial was reversed based upon ineffective assistance of counsel. Petitioner testified at the PCR hearing that trial counsel in his second trial erred by allowing a transcript of Marcus Carson's testimony from the first trial to be sent back with the jury during their deliberations. (App. p. 509, line 8 – p. 510, lines 1-4). Carson was a key State's witness in the first trial and was called as a State's witness in the second trial. Petitioner argued that the jury should not have been allowed to have a transcript of the testimony from the first trial during their deliberations in the second trial because it unduly emphasized the testimony of that witness from the first trial. State v. Gullede, 277 S.C. 368, 287 S.E.2d 488, (1982). (App. p. 509, line 14 – p. 510, lines 1-4). Petitioner testified that at trial he asked his attorney to object to the transcript being sent back with the jury, but that his attorney told him that the judge would allow it over his objection. (App. p. 510, lines 20 – p. 511, lines 1-24).

At the PCR hearing, trial counsel testified regarding this claim:

Q: Okay. Okay. And the second to the last issue is that you failed to object to the jury taking back to the deliberation room the two written statements and previous trial testimony of Mr. Carson, and that this was, that this unduly emphasized this evidence, was prejudicial to Mr. Wise under State v. Gullede, and that, that, you know, an additional ground for objection is that it was particular prejudicial based on the reference to Mr. Wise being involved in a previous trial.

A: Uh-huh. (Affirmative)

Q: Can you explain why you failed to object to the jury taking that testimony?

A: No, I, I, I'd objected to the admissibility at all (sic). Once they're admitted I didn't renew any sort of objection (sic). For them to have a piece of evidence with them, and I did not make that specific argument to the judge at that time (sic).

(App. p. 524, line 19 – p. 525, lines 1-9).

A: Okay. All right. Addressing the second part first, yeah, I didn't make a, an objection apparently for them to physically carry evidence that had been introduced back to them under a theory that it would of been prejudicial to have that sitting right in front of them (sic). So, I know I didn't do that and I addressed that.

(App. p. 532, lines 1-6). Trial counsel did not offer a strategic reason for his failure to do so. See Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) (counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial); Ingle v State, 348 S.C. 467, 560 S.E.2d 401 (2002) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness).

During the PCR hearing, the PCR judge clarified that the transcript that was allowed to go to the jury room was a transcript of Carson's testimony from petitioner's first trial. (App. p. 538, line 15 – p. 539, lines 1-7). A review of the transcript from the first trial shows that Carson testified that Wise was responsible for the crime. (App. pp. 564-604). At the second trial, however, Carson testified that his previous statements were false because the police scared him into implicating petitioner. (App. p. 539, lines 8-13). During the second trial, in regard to a statement Carson made to police which implicated petitioner, Carson first testified that he was forced to make the statement and then denied making the statement. (App. p. p. 316, lines 2-8; p. 325, lines 3-16). The State moved and the judge admitted, over objection, the statement Carson made to police in evidence (State's Exhibit #29) and the statement was published to the jury by way of display on an overhead projector and the State reading the contents of the statement into the record. (App. p. 325, line 17 – p. 326, 327, 328, 329, lines 1-17). The statement to the police was admitted as a prior inconsistent

statement. (App. pp. 312 – 329). On cross examination Carson admitted that he was also charged with murder in reference to this case but pled guilty to a lesser charge and received a probationary sentence. (App. p. 338, lines 12- p. 339, 340, 341 lines 1-2). Carson testified that at the time he made the statement, the police officers were yelling at him, telling him he was going to receive a life sentence. (App. p. 341, lines 3-8). Carson admitted that he was willing to do anything to avoid a life sentence, including signing the statement. (App. p. 341, lines 9-13).

The State also asked Carson about his testimony from the first trial. (App. p. 331, line 21 – p. 332, 333, 334, 335, line 1). Carson testified that he did not remember the prior testimony. The State then moved and the judge admitted, over objection, the transcript of the prior trial testimony as another prior inconsistent statement. (App. p. 335, lines 3-8). The transcript was marked as Court's Exhibit #2 but was not published to the jury (App. p. 335, line 12 – p. 336, lines 1-3). The trial judge later instructed the State to redact portions of the transcript so that it did not reflect that the testimony was from a previous trial. (App. p. 353, line 12 – p. 354, lines 1-9). The redacted transcript was later marked as State's Exhibit #32 but was not published to the jury. (App. p. 413, line 24 – p. 414, line 1). While there was an objection made to the admission of the prior testimony on confrontation grounds, (App. pp. 375 – 389), no objection was made to the redacted transcript being admitted as evidence for the jury to view. When the judge ruled that the redacted transcript was admissible, pursuant to Rule 613 and 804(b)(1), (App. p. 401, line 25 – p. 402, 403, lines 1-22), trial counsel should have, pursuant to State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488, (1982), moved that the State publish the redacted transcript without admitting the transcript in evidence for the jury to view. Allowing the redacted transcript, containing the highly inculpatory testimony from the first trial, in evidence for the jury to view during deliberations in the second trial unduly

emphasized the testimony. The use of the prior transcript should have been limited to impeachment during cross examination.

During closing argument in the second trial, the State capitalized on Carson's testimony from the first trial arguing, "In this case we have both kinds of evidence. There is direct evidence from Marcus Carson. He was present when it occurred and saw with his own eyes and told what he saw. That's direct evidence." (App. p. 424, lines 11-14). The transcript from the first trial should not have been admitted for the jury to view as it unduly emphasized the testimony.

In State v. Gulledge, 277 S.C. 368, 371-372, 287 S.E.2d 488, 490 (1982) the South Carolina Supreme Court wrote:

During trial, the State presented testimony that Patrolman Murphy returned to his patrol car and radioed patrol headquarters that he'd been shot and needed help. The radio communication was recorded and transcribed. Donald Ray Lane, the highway patrolman who received the call, testified about the conversation, as did the Highway Department telecommunications supervisor. The tape was also played in court. We find no error in the admission of this evidence as part of the *res gestae* exception to the hearsay rule.

However, we hold that the judge abused his discretion in allowing the jury to take the transcript of the tape into the jury room because it unduly emphasized that evidence. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980).

If trial counsel had objected, the judge would have abused his discretion in allowing the jury to have the transcript of the prior testimony in the jury room. Trial counsel was ineffective in failing to object to allowing the transcript in the jury room.

In the order of dismissal the PCR judge wrote:

In the case at hand, the Trial Judge ruled that the prior trial testimony of Marcus Carson was admissible because at trial he refused to testify and claimed he had no recollection of his previous testimony. At the Defense's request the transcript was redacted to remove any references to a previous trial of Stanley Wise. It appears that Carson's refusal to testify was a surprise to the State, and the redaction of the transcript took place during the trial of the case. For that reason, the redacted copy of

the testimony was finally presented to the court and admitted into evidence at the close of the case immediately prior to closing arguments . . .

Had Trial Counsel objected to the evidence being sent back to the jury room at that stage of the trial the Trial Judge would have had the discretion to have the evidence published to the jury at that time or to send it back with them into deliberations. It is this court's finding that either of these choices would have placed an equal level of emphasis on the evidence and, therefore, if it was an error on the part of the Trial Counsel not to make that objection it was harmless and does not call into question the outcome of the trial.

Further, unlike Gulledge, there had been no previous introduction of the prior testimony during the trial, and it would've been in the trial judge's discretion as to whether or not sending the written transcript into the jury room would have placed an overemphasis on that evidence. A trial judge would have been justified in sending it to the jury room in light of the Gulledge and Plyler reasoning. Therefore there is no assurance that the motion, if made, would have been successful (sic).”

(App. pp.561-562).

The PCR judge erred. First, as stated above, if trial counsel had moved to limit the use of the prior transcript to impeachment on cross examination and objected to sending the actual, albeit redacted, trial transcript into the jury room for their deliberations, the trial judge would have abused his discretion in allowing the transcript because it unduly emphasized that testimony in violation of Gulledge. Second, contrary to the order of dismissal and as in Gulledge, the inculpatory portion of Carson's testimony from the first trial (App. pp. 564-604) was previously introduced at the second trial in the statement Carson provided to the police (App. pp. 325-329). Carson's statement to the police was introduced in evidence in the second trial as State's Exhibit #29, was published to the jury, displayed on an overhead projector and sent into the jury room. In both the prior testimony and the statement to police Carson stated that Petitioner shot into the liquor house. (App. p. 329, lines 3-7; p. 587, line 10 – p. 588, 589, lines 1-15). Trial counsel rendered ineffective assistance of counsel when he did not object to the transcript of Carson's testimony being sent into the jury room during deliberations. Petitioner was prejudiced by counsel's deficient performance


A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id

Trial counsel was ineffective in failing to move to limit the use of the prior transcript to impeachment on cross examination and failing to object to sending the trial transcript into the jury room during deliberations. Petitioner was prejudiced by counsel's deficient performance because the testimony contained in the transcript from the first trial that the jury had during deliberations in the second trial inculpated petitioner and duplicated the statement petitioner provided to the police that had already been published to the jury and entered in evidence. The cumulative nature of the prior testimony renders that testimony particularly prejudicial and places undue emphasis on the prior testimony. Use of the transcript should have been limited to impeachment on cross examination rather than allowing the jury to view the transcript during deliberations.

CONCLUSION

Based on the above argument, the decision of the PCR judge should be reversed, post conviction relief granted and a new trial ordered.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 2nd day of August, 2013

STATE OF SOUTH CAROLINA
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STANLEY WISE,

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CERTIFICATE OF SERVICE

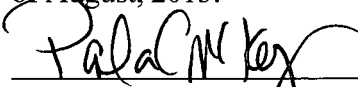
I certify that a true copy of the brief of petitioner, in this case has been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Stanley Wise #233383 Allendale Correctional Institution PO Box 1151, Hwy. 47 Fairfax, SC 29827 this 2nd day of August, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of August, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.