

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Bentley Price, Circuit Court Judge

TYRONE M. BENN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001329

PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
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

RECEIVED

Feb 20 2024

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel failed to challenge identification testimony from law enforcement with information that indicated Officer Niemiec may have confused Petitioner Tyrone Benn with another man, Desmond Benn, who lived in the neighborhood and had a strikingly similar appearance to Petitioner. Petitioner was prejudiced by the deficient performance.....6

CONCLUSION10

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where counsel failed to challenge identification testimony from law enforcement with information that indicated Officer Niemiec may have confused Petitioner Tyrone Benn with another man, Desmond Benn, who lived in the neighborhood and had a strikingly similar appearance to Petitioner, and whether Petitioner was prejudiced by the deficient performance?

STATEMENT

During the October term of 2014, a Charleston County Grand Jury indicted Tyrone Benn, Petitioner, for murder and possession of a weapon during the commission of a violent crime. App. 496 – 499. Petitioner was tried before the Honorable Deadra Jefferson and a jury, from April 11 – 13, 2016. W. Ted Smith and Shirene Hansotia represented Petitioner. Burns Wetmore and Chris Lietzow prosecuted the case. App. 1 – 2; App. 10, l. 5.

At approximately 9:40 a.m. on July 12, 2014, Samuel Coardes was shot in the back of the head and killed outside the Circle A convenience store in North Charleston. The killing took place in front of store cameras, and was captured on video. App. 86, l. 14 – 87, l. 13; App. 77, l. 9 – 78, l. 23; App. 124, l. 2 – 125, l. 8; App. 228, l. 13 – 239, l. 4. The only issue in the case was identity.

The shooting happened in the “Chicora, Cherokee neighborhood,” and the neighborhood resource officer for the area, Officer Martin, watched the video footage and claimed he could identify the shooter by his face, dreadlocks, and run. Martin did not know the man’s name, but ultimately identified Petitioner. App. 146, ll. 1-24; App. 152, l. 10 – 158, l. 11. Another officer, Officer Niemiec, identified Petitioner by “his forehead and his dreads,” as well as his “stride.” App. 125, l. 6 – 133, l. 10. Niemiec claimed he had known the shooter since 2008, and he was confident the figure on the video was “the person that I knew as Benn.” App. 125, l. 15 – 126, l. 21. “I remembered him by his *last name* mainly because of his forehead and his dreads.” App. 125, ll. 22-23 (emphasis added). However, Niemiec did not identify the shooter as Petitioner in his report, and did not speak up about identity until another officer identified Petitioner. App. 138, l. 10 – 140, l. 25.

A third officer, Officer Repman, did not immediately identify Petitioner as the shooter from watching the video but eventually claimed he recognized Petitioner as the shooter by his hairline, walk, mannerisms, and facial features. App. 179, l. 20 – 182, l. 21. Repman was initially “on the fence” about identity, but he identified Petitioner after Petitioner was brought into the police station. App. 140, ll. 15-23. The video of the shooting was State’s Exhibit #1 and is on file with this Court.

Officers attempted to apprehend Petitioner four or five hours after the shooting, and he cooperated with the arrest. According to the officers, Petitioner smelled like bleach. App. 159, l. 2 – 161, l. 19. When told he was being arrested for murder, Appellant said: “take me to jail,” which the State argued indicated guilt. App. 212, ll. 14-25. Also admitted at trial was a recording of a jail phone call, in which the State claimed Petitioner could be heard saying: “I killed that boy,” and Petitioner would later explain was him stating that the police “said I killed someone.” App. 283, l. 15 – 287, l. 20; App. 326, ll. 6-9; App. 428, ll. 8-20. No forensic evidence connected Petitioner with the crime, and no eyewitnesses identified him as the shooter. The State offered Petitioner a plea to voluntary manslaughter given its weak case, but Petitioner pleaded not guilty. App. 372, l. 18 – 373, l. 4.

Petitioner was convicted as indicted, and he was sentenced to life imprisonment for murder and five years concurrent for the weapons charge. App. 364, l. 8-23; App. 379, l. 25 – 380, l. 4. After exhausting his remedies on direct appeal, on February 15, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 382 – 388. On June 8, 2018, the State made its return. App. 389 – 393. Petitioner filed an amended application on July 17, 2019. App. 394 – 396. On October 2, 2019, a hearing was held before the Honorable Bentley Price. James Falk represented Petitioner. Benjamin Limbaugh represented the State. App. 397.

Petitioner testified that he did not start growing dreadlocks until 2012, and that Officer Niemiec must have confused him with Desmond Benn, another man that had dreadlocks in 2008 (i.e., the year Niemiec said he first came into contact with “the person that I knew as Benn”). Petitioner said he told counsel about this man. App. 416, l. 4 – 419, l. 4. Petitioner stated Desmond Benn lived in the Chicora/Cherokee area. App. 453, l. 24 – 454, l. 6. Petitioner explained police had once mistakenly arrested Desmond Benn under Petitioner’s name when Desmond Benn had dreadlocks and Petitioner did not. App. 453, ll. 19-23. “I told [counsel] that North Charleston arrested another Benn with dreadlocks from that area at the time and the known associate of Chicora and Cherokee neighborhood.” App. 431, ll. 11-18. Petitioner introduced booking photographs of himself and of Desmond Benn from 2008. The similarity of the two men’s appearances cannot be overstated. The resemblance is uncanny. The photographs show Desmond Benn had long hair in 2008 and Petitioner did not. They are located at pp. 468 – 470 of the Appendix, and are on file with this Court. Petitioner said counsel should have gotten these photographs prior to trial and used them to show the mistaken identification. App. 422, l. 15 – 423, l. 4.

Counsel recalled that although the video “was good for a convenience store video it wasn’t—there was doubt.” App. 451, ll. 8-9. Counsel testified he did not remember having a conversation with Petitioner about the possibility Niemiec was confusing Petitioner with Desmond Benn. App. 437, l. 21 – 438, l. 4; App. 444, ll. 16-22. Counsel said he recalled having a conversation about two other suspects the police initially focused on, Myron Brown and Rashad or Rashard Scott. App. 438, ll. 1-11. In summation, PCR counsel argued trial counsel should have challenged Niemiec’s identification testimony with the information about Desmond Benn. App. 458, ll. 9-21.

On May 9, 2023, PCR Counsel, James Falk, passed away. On August 27, 2023, the PCR court issued an order of dismissal. The order of dismissal addressed the allegation that “trial counsel failed to object to police officers’ testimony regarding the basis for their identification of Applicant as the person in the surveillance video who shot the victim.” App. 487. “Applicant testified one officer claimed he identified Applicant from interactions with Applicant in 2008 and Applicant’s dreadlocks, but Applicant did not have dreadlocks in 2008.” App. 487. The order of dismissal summarized testimony of the three officers who identified Petitioner from the video, and concluded,

It is clear from the record that the police officers’ identification of Applicant as the shooter in the surveillance video was not based solely on interactions with him in 2008 or his dreadlocks. In the face of each officer’s direct testimony regarding the basis for his identification, trial counsel cross-examined each one as thoroughly as possible, and used potential problems with the identifications in his closing argument. Counsel employed reasonable strategies in dealing with almost conclusive proof Applicant was the person seen in the surveillance video shooting the victim and represented Applicant as effectively as possible in the face of credible adverse evidence. Accordingly, Applicant did not prove deficiency or prejudice, and this Court denies and dismisses this allegation with prejudice.

App. 489. However, the order did not specifically reference counsel’s failure to challenge identification testimony by using information regarding Desmond Benn. As seen, PCR counsel died after the PCR hearing was held but before the order of dismissal was issued.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel failed to challenge identification testimony from law enforcement with information that indicated Officer Niemiec may have confused Petitioner Tyrone Benn with another man, Desmond Benn, who lived in the neighborhood and had a strikingly similar appearance to Petitioner. Petitioner was prejudiced by the deficient performance.

It appears the PCR court's findings at pages 487 – 489 of the Appendix were likely aimed at the Desmond Benn claim, although the order of dismissal did not specifically mention Desmond Benn. If PCR counsel Falk had lived, he undoubtedly would have filed a motion pursuant to Rule 59(e), SCRCP. However, PCR counsel died before the order of dismissal was issued. Given these highly unusual, unavoidable facts, and assuming arguendo this Court finds the order to lack sufficient specifics, Petitioner asks this Court to remand this matter to the PCR court for specific findings of fact and conclusions of law regarding counsel's failure to challenge police identification testimony with Desmond Benn's similar appearance. However, if this Court finds the order was sufficiently specific, Petitioner submits the PCR court's findings of no deficiency and no prejudice were in error.

The only issue in this case was identity. Three officers claimed they could identify Petitioner as the shooter from the video recording. One of the officers (Niemiec) said he had come into contact with Petitioner since 2008 and remembered the shooter's *last name* by his forehead and dreadlocks. App. 125, ll. 22-23. All three officers mentioned the hair or hairline of the shooter on the video as helping them identify Petitioner. Petitioner, Tyrone Benn, testified he told counsel that law enforcement may have confused him with another, similar-looking man, Desmond Benn, who lived in the area and had long hair in 2008. Petitioner explained the police

had mistakenly arrested Desmond Benn thinking that man was Petitioner on a prior occasion. Petitioner introduced booking photographs of himself and of Desmond Benn. The person committing the murder depicted in State's Exhibit #1 more closely resembles Desmond Benn (App. 469 – 470) than Petitioner (App. 468). The PCR court erred in finding no deficiency and no prejudice as to this allegation.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

“Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596-97 (2007)). “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting *Strickland*, 466 U.S. at 691). “So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.” *Edwards*, 392 S.C. at 457, 710 S.E.2d at 65. “[I]nquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions . . .” *Strickland*, 466 U.S. at 691. “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on

information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.” *Id.*

Due process protects against the admissibility of unnecessarily suggestive confrontations due to the likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Reliability is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). In addition, the Confrontation Clause ensures reliability of evidence and commands that reliability be assessed “by testing in the crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004). “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

Although counsel did not remember a conversation with Petitioner about Desmond Benn, he did not dispute that it happened. Counsel did not offer a strategic reason for failing to pursue information about Desmond Benn. The PCR court’s finding of no deficiency is unsupported by the record. Counsel should have investigated Desmond Benn, and used photographs of him to show that Petitioner did not have dreadlocks in 2008, and show the men’s similarities in appearance. This information should have been used to challenge the admissibility of Officer Niemic’s identification and, if the identification was admitted, cross-examine Officer Niemic and show the jury his identification was unreliable. Counsel’s failure to do so was unreasonable and resulted in deficient performance. *Strickland*, 466 U.S. at 691; *Crawford*, 541 U.S. at 61, *Biggers*, 409 U.S. at 198.

“To show prejudice, the applicant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial].” *Id.* In determining whether an applicant has proven prejudice, the strength of the State’s case is one significant factor to be considered, along with the specific impact of counsel’s error and other relevant considerations. *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018).

This case that came down to identity, and the primary evidence against Petitioner was identification testimony by three police officers who had familiarity with Petitioner; two of the three were hesitant to identify him initially. Attacking Niemiec’s identification would have called the State’s case into question since Petitioner did not have dreadlocks in 2008, yet Niemiec testified he had known Petitioner since 2008 and remembered his *last name*, forehead and hairstyle. It would have shown the jury that Desmond Benn, who looked strikingly similar to Petitioner, had a long hairstyle in 2008 (when Petitioner did not), had the same last name, and lived in the neighborhood where the decedent was killed. If the jury found Niemiec’s identification was unreliable, it could have found Repman and Martin’s were by extension, particularly given that Repman was admittedly “on the fence” about identity after initially reviewing the video. Absent counsel’s deficiency, there is a reasonable probability the jury would have had a reasonable doubt about Petitioner’s guilt. *Strickland*, 466 U.S. at 687; *Smalls*, 422 S.C. at 190, 810 S.E.2d at 844.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on this issue.

In the alternative, given PCR counsel Falk's untimely death following the PCR hearing but prior to the order of dismissal being issued, Petitioner respectfully requests this Court remand this case for specific findings of fact and conclusions of law regarding Desmond Benn.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of February, 2024.

RECEIVED

Feb 20 2024

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this 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."


Joanna K. Delany
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

This 20th day of February, 2024.