

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Pickens County
Edward W. Miller, Circuit Court Judge

S.C. Supreme Court

DANNY RAY GILLIAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000262

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ISSUE PRESENTED

Whether trial counsel was ineffective in failing to preserve for appellate review whether the two prior burglaries used to enhance petitioner's current burglary charge to first-degree burglary should have just been considered as one offense since they were committed so closely in time to one another?

STATEMENT

Petitioner was convicted of first-degree burglary and petit larceny after a jury trial held before the Honorable John C. Few on September 4 – 5, 2007, in Pickens County. Respective sentences of life imprisonment and ten (10) years were imposed. Robert Newton, Esquire, was trial counsel. Elizabeth Tilley, Esquire, was the assistant solicitor. (App. p. 1 – p. 199).

Petitioner appealed his convictions and they were affirmed by the Court of Appeals on March 10, 2010. State v. Gilliam, Op. No. 2010-UP-197. (App. p. 260 – p. 262). A petition for writ of certiorari was filed and it was denied on January 20, 2011, by the South Carolina Supreme Court. (App. p. 265). Petitioner filed an application for post-conviction relief on October 28, 2011. (App. p. 201 – p. 259). Respondent filed a return dated May 31, 2011. (App. p. 268 – p. 271). An evidentiary hearing was held on December 17, 2012, before the Honorable Edward W. Miller. Petitioner was present and was represented by David R. Price, Jr., Esquire. Respondent was represented by Karen Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 273 – p. 302).

On January 17, 2013, Judge Miller issued an order denying and dismissing the application for post-conviction relief. (App. p. 304 – p. 310).

This petition follows.

ARGUMENT

Trial counsel was ineffective in failing to preserve for appellate review whether the two prior burglaries used to enhance petitioner's current burglary charge to first-degree burglary should have just been considered as one offense since they were committed so closely in time to one another.

S.C. Code § 17-25-50 provides for considering closely connected offenses as one offense. It states:

In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

Petitioner had two prior burglaries – one on September 20, 1996, and the other on September 21, 1996. Petitioner pled guilty to the two burglaries on the same date. (App. p. 130, lines 5 – 25). The sentences were ordered to be served concurrently. (App. p. 295, line 21 – p. 296, line 5). The Court of Appeals found that this issue concerning the two was not preserved. (App. p. 261). That becomes the law of the case.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution 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. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733

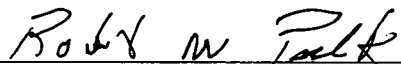
(1997). In addition, “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In this case, trial counsel was ineffective in failing to preserve the issue about the two prior burglaries being considered as one offense for purposes of sentencing since they occurred so closely in time to one another. The prejudicial effect of this was to cause petitioner’s sentence to be enhanced to life imprisonment.

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County
Edward W. Miller, Circuit Court Judge

DANNY RAY GILLIAM,

PETITIONER,

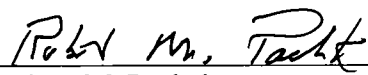
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

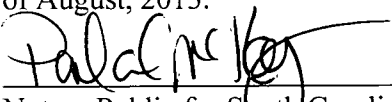
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of August, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of August, 2013.



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