THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Apr 23 2024
S.C. SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Appellate Case No.: 2018-001674

Case No.: 2024-000506

JOHN UPSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Tommy A. Thomas
S.C. Bar 5536
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

MARK R. FARTHING
Assistant Attorney General
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549

INDEX

ARGUMENT

ARGUMENT

1. That the Petitioner reasserts those arguments as presented in the Petition for Writ of Certiorari from the Court of Appeals and elects to reply to the Respondent's arguments two and three.

2. THE POST-CONVICTION RELIEF JUDGE'S CONCERN ABOUT THE VALIDITY OF EYEWITNESS TESTIMONY DUE TO THE INCORRECT "LAZY EYE" TESTIMONY WAS VALID, AND TRIAL COUNSEL'S FAILURE TO ADDRESS IT IN ANY FORM OR FASHION WAS DEFICIENT PERFORMANCE AND PREJUDICIAL TO RESPONDENT.

The Respondent takes great pains to shape this issue to be more favorable to the State. In their Return to the Petition for Writ of Certiorari they state:

> "jurors – just like the PCR judge - had a full and direct opportunity to personally view Upson for themselves and make their own determination as to whether Alston's testimony about Upson's "lazy" and "droopy" eyes negatively impacted the reliability of the identification. Cf. State v. Odom, 412 S.C. 253, 268, 772, S.E.2d 149, 156 (2015) (finding "the jury's ability to view [Odom]'s appearance in the courtroom" contributed to the error being rendered harmless. (Respondent's Return Pg. 18)

The largest obstacle to this argument is that the Petitioner does not have a "Lazy Eye" as evidenced by the intake photo requested by the Court of Appeals (App. page 609). The problem with this line of thought is that Counsel was aware of the issue of the lazy eye and did nothing to bring it to the attention of the Jury. With the Respondent's reasoning we have to assume that the Jury did in fact think to compare the testimony with the Petitioner sitting before them. It would have taken no effort for Trial Counsel to bring this issue to the attention of the Jury. The Petitioner asserts that we cannot assume an unknown hypothesis that they in fact did such a comparison.

In this case, the obvious fact that Respondent does not have a lazy eye should have been identified and used by trial counsel in order to discredit her testimony at every juncture. The proposition that the Jury could have determined this issue upon observation on their own is

deficient without Trial Counsel drawing the Jury's attention to this issue. In addition, reliance upon Odom Supra by the State is misplaced. Odom addresses the issue of Judicial notice of age which is not related to the issue before the Court.

3. THE POST-CONVICTION RELIEF JUDGE PROPERLY RULED THAT TRIAL COUNSEL FAILED TO CHALLENGE THE STATE'S EXPERT TESTIMONY AT TRIAL REGARDING CELL PHONE TOWER DATA AND, UPON PRESENTATION OF AN EXPERT AT THE EVIDENTIARY HEARING, RESPONDENT CREATED SIGNIFICANT DOUBT ABOUT THE ACCURACY OF THE INITIAL EXPERT'S TESTIMONY

The Respondent argues in its Return to Petition for Writ of Certiorari:

"Upson's contentions, the PCR judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own because the evidence the PCR judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding. Thus, the Court of Appeals correctly reversed the PCR judge's erroneous grant of relief on the basis as well." (Return to PWC, pages 19-20)

The State goes further to argue:

"The information presented during the evidentiary hearing to challenge the accuracy of Fraser's testimony did not exist until well after Upson's trial took place. Based on that fact coupled with the fact Upson's expert conceded he would have used the same "pie method" used by Fraser at the time of trial, defense counsel simply could not have been deficient for failing to avail himself of technology and evidence that was not yet in existence, and the PCR judge's conclusion to the contrary was utterly illogical."

The Respondent continuously argues the point that Petitioner's cell phone expert, that testified at the PCR hearing, used a software program that did not exist at the time of trial, which only became available in 2015. (Return to PWC page 8, citing App. P. 386, pg 402). That this program generated different maps from the older pie method (Return PWC p. 8, citing App. p. 386, pgs 390-402) and concludes with a misleading statement that "the information presented during the evidentiary hearing to challenge the accuracy of Fraser's testimony did not exist until well after Upson's trial took place." (Return page 20)

While that is true, this software was for the purpose of doublechecking the analysis done in 2013, as there was likelihood of incorrect results from PenLink. Stated differently Slovenski used the software and analysis tools that existed at the time of trial and only used TraX to double check his findings. Slovinski testified extensively to the necessity of peer verification and "getting another examiner to look at what you've done." (App. 398;25-399;12) This does not appear to have been done. In fact, Slovinski testified that you "have to" manually check results after using any program. This also appears not to have been done. (PCR TR 39;10-15). The errors in the ATF report Slovenski pointed out were as simple as not having the name or phone number of the Respondent on the documents, the date and time of reference, or even an indicator of the precise location of Captain D's. (App. 398;9-12;389;14-24). Furthermore, they did not use best practices in the industry, primarily meaning they did not reveal as specific enough detail as they should. (App. 387;18-388;11). The thrust of the testimony was not about the program used, but about the veracity and reliability of the analysis presented at trial. Slovenski used a new method to verify the analysis presented by ATF based upon the call data in trial counsel's possession and found the ATF analysis to be quite inaccurate.

Regarding the factual differences of the reports, Slovenski's analysis shows Respondent farther from Captain D's at the time of the incident than the ATF's did. (App. 395;9-14.)

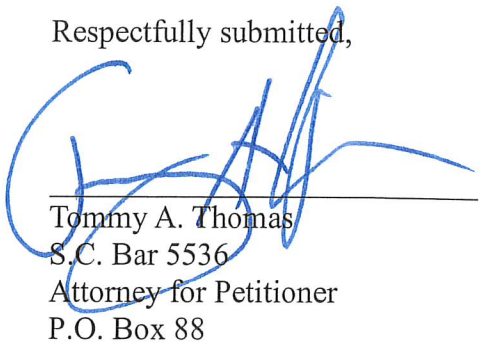
The PCR court agreed that the presentation of cell phone evidence was ineffective, inaccurate, and caused prejudice to Petitioner. Because of the failure of trial counsel to fully research and use the cell phone date, this "trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

4. That the Petitioner reasserts those arguments as presented in the Petition for Writ of Certiorari from the Court of Appeals and elects to reply to the Respondent's arguments two and three.

CONCLUSION

The Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari and order full briefing on the issues presented.

Respectfully submitted,



Tommy A. Thomas
S.C. Bar 5536
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

April 23, 2024