

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County

Honorable Michael S. Holt, Circuit Court Judge

DERRICK DUPREE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001538

JOHNSON PETITION FOR WRIT OF CERTIORARI

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May 22 2024

S.C. SUPREME COURT

INDEX

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT OF THE CASE2

ARGUMENT

**The PCR court erred in finding pre-trial counsel effective
where counsel failed to investigate the possibility of fabricated
evidence.....6**

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

ISSUE PRESENTED

Whether the PCR court erred in finding pre-trial counsel effective where counsel failed to investigate the possibility of fabricated evidence?

STATEMENT OF THE CASE

On the afternoon September 8, 2013, seventy-six-year-old Lottie Thomas and her eighty-three-year-old husband were at home watching television when the doorbell rang. Thomas went to answer the front door and met an unknown black male who asked if her home was for sale. She informed the man that the house was not currently for sale but might be in the future. The man asked if he could view the inside of the home and although skeptical, Thomas allowed him inside. Thomas took the man through the home and to speak with her husband in the den. When the individual asked Thomas to get in touch if she sold the home in the future, Thomas retrieved a pad and pen for him to leave his name and number. Thomas promised to call if she decided to sell the home. As she was walking the man back to the front door, Thomas alleged that he grabbed her from behind, bent her over a loveseat and raped her. App. 144, l. 25-App. 148, l. 25.

Law enforcement initially arrested Kadeem Lateef Hooks for the assault of Thomas. During a lengthy interrogation Hooks confessed to being in the area at the time of the incident. The interrogating officer, Jamie Seals, would testify that he had used an “interview technique” that day that “was not as professional as it usually is.” He blamed it on being up for “28, 29 hours straight.” He explained that “it was evident” he had asked Hooks several questions that Hooks could not answer, but Seals had given him the answers. The officer claimed he did not realize it during the interrogation, but that it was obvious when he watched the video of the interrogation that he had supplied Hooks with answers to the questions. App. 265, l. 7-App. 266, l. 15; App. 318, l. 23-App. 320, l. 25.

On September 11, 2013, the course of the investigation changed when SLED recovered a fingerprint from the note allegedly left by the man who assaulted Thomas. Thomas had given the note with the individual’s name and phone number on it to the police. App. 154, lines 7-13. The

officer who first received the note was not wearing gloves and left his fingerprints on it. Additionally, the officer used the note as a piece of paper on which he scribbled a few lines regarding the information he received from Thomas. App. 165, l. 9-App. 167, l. 11. SLED recovered three fingerprints from the note. Using the Automated Fingerprint Identification System (AFIS), the SLED analyst matched one of the prints to Petitioner. Hooks was subsequently released, and Petitioner was arrested for the assault of Thomas. App. 215, l. 4-App. 217, l. 9; App. 269, l. 9-App. 270, l. 11. In addition to the fingerprint evidence, SLED developed DNA profiles from a cutting from Thomas's nightshirt, a cutting from her underwear, and swabs from the sexual assault kit. The DNA profiles developed from each item matched Petitioner's DNA profile. App. 500, ll. 16-25.

On September 16, 2013, Seals received a written request from Petitioner asking to speak with law enforcement "to confess to the truth because I am ready to put this mess behind me." That same afternoon Seals interrogated Petitioner. Petitioner confessed to entering Thomas' house under false pretenses and assaulting her. Seals maintained that Petitioner was about to provide details of the incident that were never made public, such as the name left on the note and the color of Thomas' nightshirt. App. 328, l. 18-App. 334, l. 21.

A Marlboro County grand jury indicted Petitioner for burglary first degree, criminal sexual conduct first degree, kidnapping, and possession of a weapon during the commission of a violent crime in April 2014. App. 649-658. The State, represented by Kernard Redmond and Mary Thomas Johnson Lee, called the case to trial on October 13-15, 2014, before the Honorable Michael J. Nettles and a jury. App. 1. Petitioner was initially represented by Richard Jones but ultimately elected to proceed *pro se*. Jones was appointed as stand-by counsel. App. 1; App. 41, ll. 5-18. The jury convicted Petitioner as charged. App. 634, ll. 2-16. Judge Nettles sentence Petitioner to

concurrent terms of thirty years imprisonment on the burglary, criminal sexual conduct, and kidnapping charges. Petitioner was sentence to five years imprisonment on the weapons charge, to be served consecutively to his other sentences, for an aggregate sentence of thirty-five years imprisonment. App. 644, l. 18-App. 645, l. 18; App. 659-App. 662.

Petitioner timely filed a direct appeal of his convictions which were affirmed by the Court of Appeals in an unpublished opinion. State v. Dupree, Op. No. 2016-UP-442 (S.C. Ct. App. filed Oct. 26, 2016). On August 3, 2017, Petitioner filed an application for post-conviction relief. App. 663-669. The State filed a return and motion to dismiss on November 1, 2017. App. 670-674. An amended PCR application was filed on November 13, 2017, by PCR Counsel Lance Boozer. App. 675. The State filed an amended return on December 18, 2017. App. 676-682. A second amended PCR application was filed on June 28, 2019, by PCR Counsel Kristy Goldberg. App. 683-687. An evidentiary hearing was convened on March 15, 2022, before the Honorable Michael S. Holt. The State was represented by Chelsey Marto. Petitioner was represented by PCR Counsel Steven Fowler. App. 688. Petitioner, Solicitor Redman, Solicitor Johnson-Lee, and stand-by Counsel Richard Jones testified at the hearing. App. 689.

Petitioner testified that the fingerprint results which led to his arrest were falsified. He presented documents from conversations between Solicitor Redman and SLED discussing the authentication of the fingerprint card. He purported that the documents showed that the State did not have his fingerprints on the date of his arrest and in fact took his prints over a year after his arrest. He felt the communications between Solicitor Redman and SLED showed that the State never had his fingerprints. In support of his argument, Petitioner stated he never received anything regarding his fingerprints in his discovery until trial started. App. 702, ll. 5-App. 713, l. 5; App. 810-814.

Solicitor Redman testified that no evidence in the case was fabricated. App. 757, ll. 17-20. Regarding the fingerprints, Solicitor Redman stated that there had been new case law dealing with authentication of fingerprint cards and that was the context of his conversation with SLED. He confirmed that the officer that had initially taken Petitioner's fingerprints testified at trial and authenticated the card. App. 765, ll. 5-19; App. 769, l. 6-App. 773, l. 11. Standby Counsel Jones testified that he did not recall Petitioner's fingerprints being at issue. He agreed with Solicitor Redman that "it was all about authentication." He stated that because the initial hit came through AFIS the State had to do a confirmatory comparison and that Petitioner thought that because they had to confirm the hit that the fingerprints were not actually his. App. 806, ll. 3-14.

An order of dismissal was filed on September 26, 2023. The order found that Petitioner had not met his burden of proof in proving any of his claims. Regarding the potentially fabricated evidence the PCR court found the testimony of the solicitor's credible that no evidence was fabricated. Thus, counsel did not have anything to investigate. The PCR court also ruled that Petitioner had failed to show what evidence was fabricated or how it would have affected the outcome at trial. App. 814-833.

ARGUMENT

The PCR court erred in finding pre-trial counsel effective where counsel failed to investigate the possibility of fabricated evidence.

“A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Strickland v. Washington, 466 U.S. 668, 691 (1984). When evaluating the reasonableness of counsel's conduct, “the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland v. Washington, 466 U.S. at 690. Therefore, “at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (emphasis in original).

“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.” Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (citing Strickland v. Washington, 466 U.S. 668 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Strickland 466 U.S. at 695 (1984). A PCR applicant is entitled to relief based on ineffective assistance of trial counsel if he can establish that counsel's performance was deficient, and that this deficiency prejudiced his defense. Id.; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

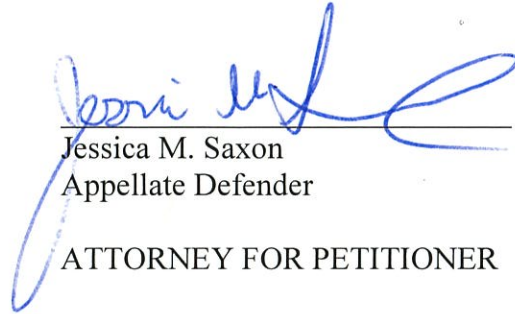
At trial and during the PCR hearing Petitioner maintained his innocence. Importantly, another individual was initially arrested for the crimes against Thomas and gave a partial

confession. However, once the State received an AFIS hit to Petitioner's fingerprints, the focus of the case shifted from the original suspect to Petitioner. It was incumbent upon defense counsel to investigate the validity of the fingerprint match which was a critical piece of evidence against Petitioner. The record reflects that counsel did not investigate the AFIS match, the subsequent retaking of Petitioner's prints, or the ultimate findings by the SLED analyst. It appears that counsel merely received the reports and took them to be true. The failure to investigate the evidence that placed Petitioner in the crosshairs of the investigation was deficient performance.

Petitioner did not offer actual proof that the fingerprint evidence was falsified. He did however provide documentation to show that the State had problems with the authentication of his fingerprints prior to trial. The documentation appeared to show an attempt to "fix" the problem by possibly issuing new reports on newly taken fingerprints. Admittedly, the officer that took the fingerprint card that was used by the State testified at trial and was cross-examined by Petitioner. However, that did not relieve counsel of the duty to investigate the evidence prior to trial.

CONCLUSION

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



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of May, 2024.

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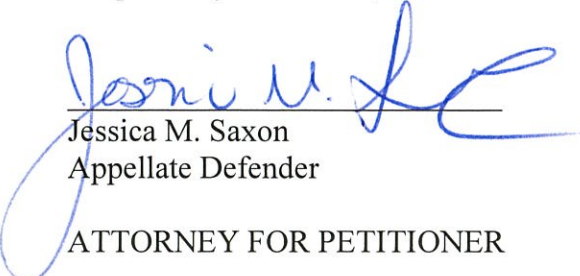
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Derrick Dupree states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Michael S. Holt, which was held on March 15, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Derrick Dupree.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of May, 2024.

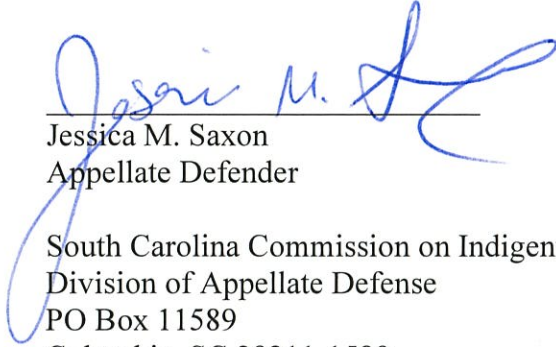
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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



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