

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jul 24 2024

S.C. SUPREME COURT

Certiorari to Newberry County

Honorable R. Scott Sprouse, Circuit Court Judge

KENNY OCTAVIS RUFF,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2023-001998

PETITION FOR WRIT OF CERTIORARI

SARAH E. SHIPE
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

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred finding defense counsel was not ineffective
for his failure to take any additional action where members of the
jury continued to sleep during petitioner’s trial after the trial court
reprimanded the jury for sleeping 4

CONCLUSION 9

ISSUE PRESENTED

Whether the PCR court erred finding defense counsel was not ineffective for his failure to take any additional action where members of the jury continued to sleep during petitioner's trial after the trial court reprimanded the jury for sleeping?

STATEMENT

On November 9, 2015, a Newberry County grand jury indicted petitioner for murder, armed robbery, and possession of a weapon during the commission of a violent crime. App. 1-6. Petitioner's case was called to trial on January 9, 2017, before the Honorable Donald B. Hocker, and a jury. App. 7. Petitioner was represented by Charles Verner. App. 7. Solicitor David Stumbo, deputy solicitor Dale Scott, and assistant solicitor Taylor Daniel prosecuted the case. App. 7.

On January 13, 2017, the jury found petitioner guilty as indicted. App. 855, l. 24-856, l. 9. Judge Hocker sentenced petitioner to concurrent terms of life without the possibility of parole for murder and armed robbery. App. 866, l. 24-867, l. 10; 869-71.

Thereafter, petitioner filed an application for post-conviction relief (PCR). App. 872-83. On November 28, 2022, an evidentiary hearing was held before the Honorable R. Scott Sprouse. App. 914-84. Petitioner was represented by Ashley A. McMahan and assistant attorney general Zachary Jones represented the state. App. 914.

On December 1, 2023, Judge Sprouse signed an order denying PCR. In the order the court found the state's evidence at trial was overwhelming pursuant to *Smalls v. State*, 422 S.C. 174, 91, 810 S.E.2d 836, 845 (2018) and therefore "none of the alleged deficiencies of trial counsel [were] 'sufficient to undermine confidence in the outcome'" of petitioner's trial. App. 995. Additionally, without any supporting legal basis, the court found petitioner failed to prove trial counsel was deficient for failing to take corrective action where the jurors were nodding off during trial. App. 998-99. The court found counsel credibly testified that "jurors who appear bored or unhappy during the presentation of the state's case tend to be favorable to the defense. App. 999.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not ineffective for his failure to take any additional action where members of the jury continued to sleep during petitioner's trial after the trial court reprimanded the jury for sleeping.

Relevant facts

At trial the state alleged petitioner entered Leslie's Salon on the afternoon of August 26, 2015, and shot and killed the owner Robert Facio Ledesma (decedent). App. 165-69. The trial centered around the identity of a man seen entering the salon in surveillance video from surrounding businesses. App. 813, l. 23. Multiple videos shown at trial depict a man entering the salon and a few moments later exiting the salon holding an item in his hand. App. 269, ll. 4-18; 273, ll. 17-19; 275, l. 14-277, l. 5; 484, ll. 2-20. Decedent was discovered by his niece shortly after. App. 187, ll. 12-13; 188, l. 9-189, l. 18.

Emanuel Richardson testified he saw petitioner enter the salon the day of the incident. App. 313, ll. 16-22. A cab driver, Shawarror Simms, who drove petitioner earlier in the day testified she saw petitioner in the area close to the salon around 12:30 pm on the day of the incident. App. 340, l. 19-341, l. 16; 351, ll. 13-21. Petitioner admitted to law enforcement that he entered the salon that day and spoke to decedent, but he denied having anything to do with the killing of decedent. App. 491, l. 22-493, l. 12. Petitioner offered to submit to a gun shot residue test but law enforcement declined to conduct a test of petitioner's hands. App. 495, ll. 15-17.

Midway through trial, the court issued the following warning to the jury:

I've noticed that *several* jurors have been nodding off. While I realize it is difficult to sit and not get tired when you sit for extended periods of time, I understand that's difficult. However, *I cannot have any member of this jury nodding off which indicates that they are not being attentive to what is going on.* I'm sitting here as you are, even though I can get up and move around, I typically don't while witnesses testify, and I'm not having

a problem nodding off, okay? When I excuse you at the end of the day, I always tell you that it's just routine for me to tell juries this, get plenty of rest. So I take it very seriously that *if you are nodding off, then you're not performing your duties as jurors*. So I will not tolerate any member of the panel or member of the jury nodding off, not being attentive, not listening to what is going on. Now, I'm not going to single you out now, okay, you know who you are. If you need to take a short nap during lunch break, then you better do that, okay?

App. 589, l. 7-590, l. 1 (emphasis added).

At the evidentiary hearing petitioner testified that during trial there were jurors "falling asleep." App. 929, ll. 18-20. He said after the court's warning to the jury to pay attention, he noticed members of the jury sleeping. App. 930, ll. 6-11. Petitioner advised defense counsel jurors were sleeping again, but counsel failed to object or make any motion to the court regarding the jury's inattention. App. 930, ll. 1-5.

Defense counsel testified he recalled the trial court admonishing the jury about falling asleep. App. 952, ll. 1-4. He admitted petitioner may have pointed out the jury's lack of attention after the court's warning. App. 966, ll. 1-8. However, he testified that he did not believe that jurors sleeping was grounds for a mistrial or objection. App. 952, ll. 5-6. Defense counsel explained:

I don't know because I as a defense attorney, I'm typically not overly opposed to a non into every detail jury panel, and I get it wrong from looking at jury members, but it's typically jurors that look bored or unhappy are slightly more defense prone supportive. The, you know, *I generally like it when the jury at two or three days into trial looks like they are just ready to get out and bored*. But I don't know that that was this case, and I just, I do remember the Judge calling somebody down as a group, but it wasn't one individual.

App. 966, ll. 12-20 (emphasis added).

Discussion

In *State v. Smith*, the Court of Appeals framed the issue of juror(s) sleeping during trial as

one of “juror misconduct.” *State v. Smith*, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999); See George L. Blum, Annotation, *Inattention of Juror From Sleepiness or Other Cause as Ground for Reversal or New Trial*, 59 A.L.R.5th 1 (1998 & Supp.1999); 23A C.J.S. Criminal Law § 1437 (1989 & Supp.1999); *State v. Cleveland*, 959 S.W.2d 548 (Tenn.1997) (distinguishing case of absent juror, which implicated fundamental constitutional right to trial by jury and therefore required automatic reversal, from that of juror who slept through five minutes of testimony, which required a finding of prejudice to defendant before reversal). The court in *Smith* went on to say, “[m]isconduct of a juror is ‘a fact to be determined by the trial judge from the circumstances’ of each case.” *Id.* (internal citations omitted).

In *State v. Hurd*, the Court of Appeals reversed defendant’s convictions where the lower court denied defendant’s request to question the juror who appeared to be sleeping during closing arguments and jury instructions. 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996). In that case Hurd asserted the trial court erred by refusing to replace a sleeping juror, at trial counsel for Hurd brought the situation to the attention of the trial court. The trial court responded that while the juror was “nodding off a couple of times, [] he was alert during most of the charge” and denied counsel’s motion to remove the juror. *Id.*

On appeal the Court held “it [was] incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified,” and “the court must not speculate ... but must ascertain the juror’s state of mind and must place its reasons for excusing or retaining the juror on the record.” *Id.* The Court reasoned that simply because a juror closed their eyes does not necessarily mean that they were asleep, but the trial court should at least attempt to make this determination whenever a juror appears to be asleep. *Id.* Further the Court held the trial court committed reversible error by refusing defense counsel’s request to question

the juror as to whether he heard all of the charge. *Id*

Here there is no question there were jurors sleeping during trial where the court reprimanded them during trial and where petitioner and counsel both recall the jury sleeping after the court's warning. Defense counsel had a duty to take additional steps to ensure that petitioner received a fair trial which includes a jury that is, at the very least, awake during the presentation of the evidence.

The test for determining effective assistance of counsel has been set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). First, the applicant must show that defense counsel's performance was deficient. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* quoting *Strickland*, 466 U.S. at 688.

The PCR court erred finding counsel was not ineffective for failing to make any objection to the court regarding the jury continuing to fall asleep during trial after the court had warned the jury. First, the PCR court failed to cite any authority in support of its finding that counsel was not deficient on this allegation. Second, interestingly the PCR court found counsel credibly testified that he believed bored or unhappy jurors are favorable to the defense. This case revolved around multiple surveillance videos in the area that the state purported showed petitioner entering the salon prior to decedent's death. There were issues at trial regarding inaccurate timestamps on more than one of the recordings the state relied on. Thus, it was tantamount that the jury pay very close attention to the evidence presented at trial. Defense counsel's supposed strategy based on his belief that a bored jury is good for the defense is incredible at best. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (if counsel

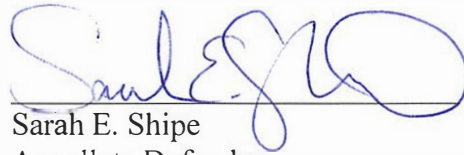
articulates a valid reason for employing certain trial strategy, such tactics will not be deemed ineffective assistance of counsel); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the applicant to the extent 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 688. The defendant is required to overcome the presumption that counsel was effective in order to receive relief. *Id.*

The PCR court wrongly found the evidence in this case was overwhelming such that it precluded any finding of prejudice. Petitioner was prejudiced where but for counsel’s failure to bring to the court’s attention the issue of sleeping jurors the result of the proceeding would have been different. The state entered a considerable amount of evidence including the aforementioned video recordings and the jury’s inattention certainly impacted the result of petitioner’s trial.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of July, 2024.