

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 22 2024

S.C. SUPREME COURT

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Certiorari to Edgefield County

Honorable George M. McFaddin, Circuit Court Judge

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MAURICE ANTHONY ODOM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000517

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JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

SARAH E. SHIPE
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ISSUE PRESENTED

Did the PCR court err finding counsel was not ineffective for misadvising petitioner regarding his right to testify at trial, where petitioner's testimony refuting his brother's version of events was vital to his defense?

STATEMENT

On July 31, 2013, an Edgefield County grand jury indicted petitioner for burglary, second degree. App. 1-2. Petitioner's first trial ended in a mistrial. App. 510, ll. 12-14. His case was retried June 8-10, 2015, before the Honorable R. Knox McMahan and a jury. App. 3-469. Petitioner was represented by Bennett Casto and Erik Drylie. App. 3. Assistant solicitors, Ervin Maye and Franklin Young represented the state. App. 3.

The jury found petitioner guilty as indicted. App. 447, ll. 4-9. Judge McMahan sentenced petitioner to life without parole (LWOP). App. 468, l. 23-469, l. 2; 471.

On direct appeal, appellate counsel filed a brief with the Court of Appeals arguing 1) the trial court erred sentencing petitioner to LWOP, where a prior conviction should not have been considered a most serious offense; and 2) the trial court erred refusing to dismiss petitioner's indictment where the state failed to call the case for trial for six years and the subsequent retrial for almost eight years after his arrest. App. 597. The Court of Appeals affirmed petitioner's conviction and sentence. *State v. Odom*, 2018-UP-273 (S.C. Ct. App. filed June 27, 2018); App. 598. Appellate counsel sought certiorari to the Supreme Court. The Court granted certiorari on the speedy trial issue but later dismissed the writ of certiorari as improvidently granted. *State v. Odom*, 2020-MO-001 (S.C. Sup. Ct. filed January 22, 2020); App. 598.

Thereafter petitioner filed an application for PCR. App. 472-487; 506-507. An evidentiary hearing was held on October 10, 2022, before the Honorable George M. McFaddin, Jr. App. 508-95. Ashley McMahan represented petitioner. App. 508. Assistant attorney general, Taylor Smith, represented the state. App. 508.

On March 6, 2024, Judge McFaddin signed an order denying PCR. App. 593-625. The PCR court found petitioner was not deficient in his advice that petitioner should not testify

because his prior convictions would be admissible. The court further found petitioner failed to show any prejudice where the court found he failed to show his prior convictions were not admissible and where he failed to show the result of trial would have been different had he testified and the prior convictions been found inadmissible.

ARGUMENT

The PCR court erred finding counsel was not ineffective for misadvising petitioner regarding his right to testify at trial, where petitioner's testimony refuting his brother's version of events was vital to his defense.

Facts

On October 17, 2007, just before 2:00 AM two masked men threw a block through the window of the IGA grocery store in Johnston and stole ninety cartons of cigarettes. The store alarm was triggered and the police were notified. As police were investigating the burglary they discovered a white Cadillac parked in the woods about a half a mile from the IGA. App. 193, ll. 5-9. When the officer shined his flashlight on the Cadillac he saw two persons change clothes and run into the woods. App. 193, ll. 15-24. Officers searched the Cadillac and found identification documents belonging to petitioner. fApp. 217-219. Officers also found a bill of sale for the Cadillac reflecting that Dukes Boys Auto Sales sold the car to Demetrius Odom on September 22, 2007. App. 228, ll. 12-21. The officers also found an insurance identification card with Demetrius Odom's name on it. App. 228, l. 22-229, l. 7. Jessie James Dukes from Dukes Boys Auto Sales testified that he sold the Cadillac to "Temetrius" Odom and petitioner was present at the time of the sale. App. 314-315.

Additionally, officers found inside the car a cell phone belonging to petitioner as well as another cell phone. App. 288, l. 22-289, l. 17. On the other phone the police called a contact labeled "Momma" and learned that this phone belonged to the co-defendant and petitioner's half-brother, Brandon Donaldson. Both petitioner and Donaldson were charged with the IGA burglary. App. 290, ll. 3-24. Donaldson testified against petitioner at trial. App. 241-279. Petitioner did not testify. App. 377-384.

Petitioner testified during his evidentiary hearing he moved to have defense counsel relieved at the beginning of trial. App. 531, ll. 9-15. He asserted he wanted to testify in his trial but he was advised the state would be able to bring up his prior convictions. Petitioner was afraid to testify knowing that his prior convictions would make him look bad to the jury. App. 531, l. 20-532, l. 21.

Defense counsel could not recall the conversation he had with petitioner regarding his testifying at trial. However, counsel stated that he regularly counseled clients that if they took the stand and had a record it would come out and although the court would advise the jury to disregard it the jury might hold it against them. App. 581, ll. 16-23. Counsel admitted that he told petitioner he should not testify given his prior convictions. App. 582, ll. 1-8.

Discussion

The right of a criminally accused to testify or not to testify is fundamental. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (“[F]undamental to a personal defense ... is an accused’s right to present his own version of the events in his own words”) (internal citations omitted). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” *Id.* at 53. “The right to testify on one’s own behalf at a criminal trial has sources in several provisions of the Constitution.” *Id.* at 51. “It is one of the rights that are essential to due process of law in a fair adversary process.” *Id.* “The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call ‘witnesses in his favor,’ a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment.” *Id.* at 52. “The opportunity to testify is also a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony.” *Id.* “The choice of whether to testify in one’s own defense ... is an exercise of [that] constitutional privilege.” *Id.* at 53 (internal quotations removed). Stated plainly, “[a] person’s right ... to be heard in his defense—a right to his day in court—[is] basic in

our system of jurisprudence; ...” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (internal quotations removed).

“Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an intentional relinquishment or abandonment of a *known* right or privilege.” *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (emphasis in original) (internal quotations removed). “The defendant can then make the choice of whether to take the stand with the advice of competent counsel.” *Teague* at 1533.

Our Supreme Court addressed this issue in *Horton v. State*, 306 S.C. 252, 411 S.E.2d 223 (1991). In *Horton* the defendant wanted to testify but chose not to take the stand based on the advice of counsel that he would be impeached with two prior convictions, a 1980 simple possession of marijuana and a 1972 assault and battery with intent to kill. *Id.* at 253-254, 411 S.E.2d at 224. The Court determined under then recognized standard, the simple possession of marijuana could not be used against the defendant because it was not a crime of moral turpitude. Turning to the 1972 ABWIK conviction, the Court found that although it was a crime of moral turpitude, “the lapse of fifteen years between petitioner's 1972 conviction and his 1987 trial for distribution of cocaine raise[d] the issue of remoteness in time,” which was matter within in the sound discretion of the trial judge. The record did not contain a showing that trial counsel sought a ruling from the trial judge on the admissibility of the remote-in-time conviction. The Court determined that counsel’s advice was “premised upon an unsubstantiated legal assumption, and

he was under a duty to move the court for a ruling either confirming or invalidating his assumption.” *Id.* at 254-255, 411 S.E.2d at 224.

Here, there was no physical evidence that linked petitioner to the IGA scene. There was evidence linking petitioner to the car found nearby, which was not evidence petitioner participated in the robbery. The sole evidence that connected petitioner to the burglary was the incredible, self-serving testimony of his co-defendant and brother Donaldson. Donaldson’s recollection that petitioner was the more culpable party was questionable at best where he admitted he hoped his testimony would benefit him. App. 267, l. 13-269, l. 4; 271, l. 4-272, l. 15. Additionally, Donaldson admitted he suffered mental health difficulties since childhood. He testified that he heard voices. App. 276-78.

Petitioner was precluded from telling his side of the story because of the failings of defense counsel. Had petitioner been properly advised he would have testified to his version of the events and petitioner’s testimony would have impacted the outcome of the proceedings. Petitioner admitted his car was used by contended he was not there rather Donaldson and another family member took his car the evening of the robbery. App. 539, ll. 19-24.

Turning to prejudice the *Horton* Court noted that the State’s evidence against the defendant “consisted solely of Agent Peaster’s testimony.” Further, the defendant contended he wanted to testify about his belief that he was framed by the confidential informant but ultimately decided not to testify based on the advice of counsel. The Court concluded that the defendant had “met the second prong of the ineffective assistance test by a showing of prejudice by his reliance upon counsel's erroneous advice; and that, but for counsel's error, there is a reasonable probability the result would have been different.” *Id.* at 255, 411 S.E.2d at 225.

Petitioner satisfied both prongs of the *Strickland*¹ analysis. Defense counsel was deficient in his advice not to testify. Counsel's deficiency prejudiced petitioner because it deprived him of his right to testify. It further deprived the jury of the opportunity to hear, from petitioner, his side of the story which was vital to his defense at trial. Petitioner has shown ineffective assistance of defense counsel and the ruling of the PCR court should be reversed.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

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 22nd day of August, 2024.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice Anthony Odom 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 George M. McFaddin, which was held on October 10, 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 Maurice Anthony Odom.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of August, 2024.

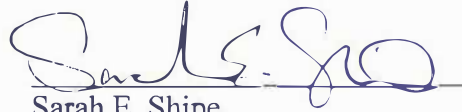
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CERTIFICATE OF COUNSEL

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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