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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable George M. McFaddin, Circuit Court Judge

J'QUAN MARQUEL SCOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000470

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for failing to move for recusal of the judge who accepted the guilty plea and sentenced Petitioner to life in prison when the record shows bias or prejudice on the part of the judge against plea counsel?

STATEMENT

In December of 2013, the Charleston County Grand Jury indicted Petitioner, J'quan Marquel Scott, for murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime, indictments #2013-GS-10-7416, 7418, 7419, 7421.[1] (App. pp. 110-117). On May 27, 2015, Petitioner appeared before the Honorable Kristi L. Harrington for a roster meeting and pre-trial conference. James A. Brown, Jr. represented Petitioner. Solicitor Scarlett Wilson represented the State. After the pre-trial hearing, Petitioner pled guilty, as indicted, before Judge Harrington. (App. pp. 27-45). Sentencing was deferred. (App. p. 28, lines 4-7).

On August 26, 2015, Petitioner appeared again before Judge Harrington for sentencing. James A. Brown, Jr., again represented Petitioner. Solicitor Scarlett Wilson again represented the State. Judge Harrington sentenced Petitioner to life in prison for murder, thirty (30) years concurrent for armed robbery, thirty (30) years concurrent for kidnapping, and five (5) years concurrent for the weapons charge. (App. pp. 118-121). A motion to reconsider sentence was filed on September 4, 2015. (App. pp. 122-124). The motion was denied on October 19, 2015. (App. p. 127). Petitioner received notice of the denial on March 4, 2016, and served a timely amended notice of intent to appeal on March 28, 2016. (App. pp. 125-126).

On February 16, 2017, Robert M. Pachak, filed a brief on Petitioner's behalf pursuant to Anders v. California, 386 U.S. 738 (1967), raising the issue of whether there was sufficient evidence to support the judge's order denying the motion to reconsider sentence. On April 6, 2017, Petitioner filed a *pro se* response. On December 15, 2017, the South Carolina Court of Appeals ordered briefing on the issue of whether the circuit court erred by sentencing Scott to

[1] It is unclear who testified before the Grand Jury as the witness is listed as the Charleson County Sheriff's Office. (App. p. 110, 112, 114, 116).

thirty years imprisonment for kidnapping in light of section 16-3-910 of the South Carolina Code (2015) and State v. Vick, 384 S.C. 189, 683 S.E.2d 275 (Ct.App. 2009). After additional briefs were filed, the Court of Appeals affirmed the convictions on October 17, 2018. State v. J'quan Marquel Scott, Op. No. 2018-UP-380 (S.C.Ct.App. filed October 17, 2018).

On October 17, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 177- 189). The State filed a return and motion for more definite statement on February 12, 2020. On February 6, 2023, an evidentiary hearing was held before the Honorable George M. McFaddin, Jr. James K. Falk represented Petitioner. T. Cruise Mitchell represented the State. In a written order signed March 19, 2024, Judge McFaddin vacated the sentence for kidnapping, denied relief on the other allegations, and dismissed the application. (App. pp. 270-286). A timely notice of intent to appeal was filed on March 26, 2024. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to move for recusal of the judge who accepted the guilty plea and sentenced Petitioner to life in prison when the record shows bias or prejudice on the part of the judge against plea counsel.

During a pre-trial conference on May 27, 2015, Judge Harrington heard motions made by defense counsel. (App. pp. 4-26). During a motion regarding the assignment of a judge to the case, defense counsel stated that he had not been permitted to make a record. (App. p. 6, line 17 – p.7, lines 1-20). Judge Harrington responded, "You can make it at a later time. Move on to your next issue." (App. p. 7, lines 21-22). Defense counsel continued, "Your Honor, I have got to be able to proffer the information for the purpose of an interlocutory appeal." (App. p. 7, lines 23-25). The judge responded, "I have ruled. You will make your motion as to recusing the prosecutor." (App. p. 8, lines 1-2). Defense counsel then asked, "Your Honor, if I could submit the attachments that go along with that?" (App. p. 8, lines 3-4). The judge answered, "I have not prevented you from doing that but I'm going to tell you one more time and if I have to direct you again, I'm going to find you in contempt. Now, I want to hear about the motion to recuse the prosecutor." (App. p. 8, lines 5-9). Despite the judge threatening to hold defense counsel in contempt, counsel elected that same day to appear before the same judge with his client who pled guilty, without negotiations or recommendations, as indicted for murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. Sentencing was deferred until August 26, 2015.

Technical difficulties took place on the day of sentencing. When the hearing began the judge commented:

> I think for counsel and everyone in the audience and everyone involved in this case, let me first of all thank you for your patience. We had some technical difficulties due to some information that Mr. Brown [defense counsel] wishes to

> present to the Court based upon mitigation for his client. The Courtroom upstairs was not suited for that technology, and the Clerk of Court here and her staff have been working diligently to provide this Courtroom so that we could provide Mr. Brown with what was needed to present his mitigation on behalf of his client.
>
> Thank you for your patience and understanding. I know we are off schedule, and I apologize for that. The Clerk has made every effort to facilitate the technology that is needed and to make sure it is up and running. So, again, thank you for your patience, and I do apologize for the inconvenience.
>
> Anything further, Mr. Brown? Anything further regarding that matter, Mr. Brown?

(App. p. 50, line 20 – p. 51, lines 1-12). Mr. Brown, plea counsel, answered, "Just that at some point in time there are some comments I would ask to put on the record." (App. p. 51, lines 13-14).

After hearing from both the prosecution and the defense, Judge Harrington sentenced Petitioner to life in prison for murder, thirty (30) years concurrent for armed robbery, thirty (30) years concurrent for kidnapping, and five (5) years concurrent for the weapons charge. (App. p. 97, lines 2-18). Petitioner had no prior criminal record. (App. p. 40, lines 17-18). The judge then stated, "We will take up the matters Mr. Brown is wishing to put on the record after the break." (App. p. 97, lines 21-22).

After the break, the judge heard from plea counsel who said:

> Primarily, I guess the issues are that today twice in Chambers and before sentencing there was chastisement of me by Your Honor, and it put me in an awkward situation, because if I ask you to recuse yourself because I may have done something to anger you – and again I'm not implying that it was Your Honor that did anything. But it would put me in an awkward situation because if you denied recusal then that would just add insult to injury, and, on the other hand, if I don't do it and I'm looking in the rear view mirror by saying . . .

(App. p. 98, lines 6 -16). The judge then stated, "Mr. Brown, after spending eleven hours or six hours on some issues, you never once let me know you were even thinking about asking me to recuse myself." (App. p. 98, lines 17-19). Plea counsel replied, "That's because I didn't think

that it was in my best interest or in my client's interest." (App. p. 98, lines 20-21). Plea counsel had concerns prior to the imposition of sentence and advised the judge he needed to place some comments on the record. (App. p. 51, lines 13-14). The motion to reconsider sentence was later filed on September 4, 2015. (App. pp. 122-124).

The judge asked plea counsel, "Just so the record is abundantly clear and you haven't asked, but would you state for the record why you would want me to recuse myself?" (App. p. 99, lines 5-7). Plea counsel responded:

> Your Honor, I have used the word chastised and you may not agree with that characterization, but I did not know the video was not available, but I did take offense to that. I don't disagree with the Court because I know what we did during the the last two and a half days. On top of the embarrassment of standing in the Courtroom, then I get insulted because even though there had been a non-stop effort in this case since Sunday on my part in preparation that didn't work because I guess for some reason there wasn't a TV in the courtroom that worked or we didn't have a table.

(App. p. 99, lines 8-19). The judge told plea counsel:

> In that very hallway or in that Courtroom. It would have behooved you to just simply say I need the technology. And so I think my staff did very well. I have never seen them not accommodate anyone. But the entire Courtroom was moved with all that involved just to accommodate you, and I have heard or it got back to me that you – I don't know if it was from you, but there were comments made that it was the Judge's fault or the Clerk of Court's fault or that we were not accommodating.
>
> So I clearly in chambers – in a conference in chambers and in the hallway said that it was noone's [sic] fault, and it had nothing to do with you. I have had solicitors and attorneys who were not prepared, but I made a comment to you that I have made every effort to be accommodating and especially to you because you have worked hard to get the case prepared for sentencing and for trial, and to hear that anyone on my staff or the Clerk's staff did not accommodate you is not acceptable.

(App. p. 101, line 19 – p. 102, lines 1-12). Plea counsel denied making any comments that accused staff of not accommodating him. (App. p. 1-2, lines 18-21). Plea counsel stated, "All I'm saying was that I needed to put some things on the record because otherwise something may

later come up. I did not choose to make the motion, and I have explained the dilemma of making my motion before, Judge; and that, if denied, and it is before the same judge I'm before – I have concerns about whether she can be fair; that if I make the motion before her and it is denied that then I still wold [sic] have to appear before her. So that is the kind of dilemma – that is the dilemma that I . . ." (App. p. 105, lines 3-14). Plea counsel confirmed that he was not moving for recusal. (App. p. 105, lines 15-17).

Finally, the judge stated, "I hope you are not thinking that your client received life because you did not bring the proper equipment." (App. p. 106, lines 19-21). Plea counsel answered, "What is clear to me is that I did not make the motion. If I had thought it would be successful, I would have, Your Honor." (App. p. 106, lines 22-24). The judge asked plea counsel about PCR and plea counsel responded, "That is why I'm on the record now, absolutely." (App. p. 107, lines 4-5).

On September 4, 2015, plea counsel filed a motion to reconsider sentence. (App. pp. 122-124). In the motion to reconsider sentence plea counsel wrote, "The Court then moved the sentencing from courtroom 3E to 4B. the Court met with counsel in the hallway behind the courtroom, outside the presence of the Defendant, before sentencing. During this off the record meeting the Court chastised counsel for the Defendant, telling him that it was 'all [his] fault' for the sentencing problems and that this could have been avoided if counsel would have let her office know about the presentation." (App. p. 123). In the motion counsel also stated that he notified the judge's law clerk and the Solicitor about the presentation prior to the sentencing date. (App. p. 123). Judge Harrington denied the motion to reconsider sentence on October 19, 2015. (App. p. 127).

During the PCR hearing plea counsel testified that on the Monday prior to sentencing on Thursday he provided the judge and the prosecutor with a copy of a PowerPoint presentation that he planned to present during the sentencing hearing. (App. p. 223, lines 1-19). Plea counsel testified that on the day of sentencing they had to change courtrooms because the original courtroom did not have video capabilities. (App. p. 22, lines 15-24). Plea counsel testified, "We moved. It took some time to move, not us. In fact, the irony is that after fumbling with a projector up in the other courtroom, when we plugged in to the new courtroom, everything came up instantly. We were talking about a number of seconds, but I think the time spent moving was to move the TV cameras to the jury box." (App. p. 229, line 24 – p. 230, lines 1-4).

Plea counsel then testified, "But before that sentencing, the judge called us back into the hallway right behind, like ten feet behind where I'm sitting right now, and I don't know if it was this same courtroom, but back in the chamber or back in the hallway was Judge Harrington, her law clerk, myself, Adam Mlynarczyk, [representing a co-defendant], Solicitor Wilson, and the deceased's mother." (App. p. 230, lines 5-10). Plea counsel continued, "And there was no -- no court reporter, and my client wasn't back there. And the only phrase that I recall, because it was not a long conversation, was it's all your fault, Mr. Brown. And to this day, I'm not sure what was all my fault . . ." (App. p. 230, lines 14-17). Plea counsel confirmed that the judge was stern and not joking when she told him this was his fault. (App. p. 233, lines 15-22). Plea counsel testified, "In hindsight, I should have moved to recuse her." (App. p. 233, line 23). Plea counsel explained, "Well, I guess the hubris in me thought that we could still end up with something better than life, if not better than 40, I mean, and I don't know if you call that strategy." (App. p. 233, line 25 – p. 234, lines 1-2).

When asked if there was a strategic reason for not moving for recusal, plea counsel answered:

> I don't know if it was strategic, I've got to be honest with you, and – and you and I did speak about this on Friday. You know, if you move to recuse, it's kind of like the proverbial taking a shot at the king and missing. They're not well received. I've actually never moved for a judge to recuse themselves ever, but I don't know that in that short time frame there was a deliberate process about that. So I don't – I don't know that I actually reflected on it like – like the question asked whether I reflect on it, recusing her, because it was just a moment – a matter of moments beforehand.

(App. p. 250, lines 8-18).

During the PCR hearing Solicitor Scarlett Wilson was asked if she witnessed anything that would indicate Judge Harrington was biased. Solicitor Wilson answered, "No. The talk about it's your fault was clearly about the delay that was going on with whether or not the equipment would work. And while Judge Harrington seemed to be irritated, lots of judges get irritated all the time with me or with the other side, and not for a minute would I have ever thought or did I think then that Judge Harrington was letting that influence the sentence in this matter. I certainly wouldn't encourage that." (App. p. 259, lines 2-9). Although the Solicitor did not recall the exact words used she did not challenge plea counsel's testimony that the judge told him this was his fault. (App. p. 260, line 24 – p. 261, lines 1-8).

In the order of dismissal the PCR judge wrote:

> This Court finds there was no meritorious reason to require Judge Harrington to recuse herself. "Pursuant to Canon 3(E)10(a) of Rule 501, SCAR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." *State v. Jackson*, 353 S.C 625 578 S.E.2d 744, 745 (Ct. App. 2003). "It is not enough for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice." *Id.* (citing *Roche v. Young Bros, Inc., of Florence*, 332 S.C 75, 504 S.E.2d 311 (1998). "The alleged bias or prejudice must stem form an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge." *Id.* (citing *Payne v. Holiday Towers, Inc.,* 283 S.C. 210, 321S.E.2d 179 (Ct. App. 1984). Here, Applicant

> presented no evidence the life sentence Judge Harrington handed down was based on anything other than information she learned from her participation in this case. A mere allegation that a Plea Judge was irritated regarding technological issues in the courtroom is wholly inadequate to demonstrate bias or warrant recusal. Therefore, Counsel was not deficient for failing to move for Judge Harrington's recusal in this case. Accordingly, Applicant has failed to meet his burden, and this allegation is **DENIED.**

(App. p. 281). The PCR judge erred. The judge's interaction with plea counsel during the guilty plea when she threatened to hold him in contempt as well as at the sentencing hearing when she blamed him for the delay show that she was biased against him. Plea counsel was ineffective in failing to move to recuse the judge. Petitioner was prejudiced by plea counsel's deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002), the South Carolina Court of Appeals wrote, "The Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned.' Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR." In State v. Howard, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct. App. 2009), the South Carolina Court of Appeals, citing Cheatum, wrote:

> "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct.App.2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." Id. "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." Id.

The judge in the present case showed personal bias against defense counsel when she threatened to hold him in contempt of court prior to the guilty plea and blamed him for the delay at sentencing. Counsel was ineffective for failing to move to recuse the judge. There is a reasonable probability that if the motion had been made, the judge would have recused herself and another judge would have imposed a sentence other than life imprisonment when Petitioner pled guilty and had no prior criminal record.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2024.