

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 25 2024

S.C. SUPREME COURT

Certiorari to Newberry County

Honorable B. Alex Hyman, Circuit Court Judge

ANSEL BRADLEY WALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000921

JOHNSON PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
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

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ISSUE PRESENTED

Did the PCR court err in finding trial counsel effective when he admitted to not requesting the witnesses to petitioner's argument with a homeowner be sequestered when the outcome of the trial turned on witness credibility and whether petitioner entered the home or remained on the threshold during a verbal altercation?

STATEMENT

On December 7, 2018, Petitioner went to Jennifer Saverance's house to ask her to stop spreading rumors around town about him being a drug addict. App. 129, l. 19 – 130, l. 3; 131, l. 20 – 132, l. 5. Petitioner was in a relationship with Saverance's mother for an extended period and had known Saverance for over thirty years and considered himself Saverance's stepdad. App. 128, l. 13 – 129, l. 9.

Petitioner maintained that he never entered Saverance's house but only spoke with her at the doorway. App. 133, ll. 14 – 19. Petitioner was "armed" with an electrical tool, the size and shape of an Allen wrench, but was not holding the tool when he was speaking to Saverance because he had placed it back in his pocket after tapping on the window. App. 135, l. 22 – 136, l. 1. Petitioner denied having the intention of striking or harming Saverance in any way. Tr. 139, ll. 23 – 25.

Saverance relayed a different story about the encounter. Saverance claimed that when she opened the door to see who it was, petitioner pushed the door open and came into her house. App. 44, ll. 4 – 7. Saverance recalled: "[Appellant] pushes the door open and he gets in my face and he has the tool raised up the whole time. And he said, I'll kill you, you fucking bitch and he walks me backwards into the house." App. 45, ll. 1 – 6. Saverance was inconsistent in the interactions at the doorway to her home, telling officers different versions of petitioner's alleged entry into the home. App. 104, ll. 2 – 22; 108, l. 2 – 109, l. 23.

In this he said she said situation about petitioner's entry into the home, Saverance's son, CJ, became an essential witness. CJ claimed that he heard his mom arguing with someone and he went into the room where his mom was with petitioner and petitioner then backed up out of the house. Tr. 67, l. 5 - 68, l. 7. Both Saverance and CJ maintained that after petitioner initially

backed out of the house when CJ came into the room, petitioner entered the house a second time before finally leaving. App. 49, ll. 3 – 10; 68, ll. 2 – 7.

Despite the importance of witness credibility and the varying accounts presented by Saverance, witnesses were not sequestered, allowing CJ to hear the details of Saverance's testimony before the jury. App. 322, l. 21 – 323, l. 7.

Petitioner was indicted by the Newberry County grand jury for burglary first degree and assault and battery first degree, with both indictments listing the victim as Jennifer Saverance. App. 345, 347. Petitioner's trial was held before the Honorable R. Scott Sprouse and a jury from April 22 – 23, 2019. App. 1. Petitioner was represented by Charles Verner and the state was represented by Dale Scott and Taylor Daniel. App. 1.

The jury found petitioner guilty as charged. App. 244. The judge sentenced petitioner to fifteen years imprisonment for the burglary and a concurrent ten years imprisonment for the assault and battery. App. 251. The S.C. Court of Appeals dismissed petitioner's direct appeal with appellant counsel, Adam Ruffin, filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Wallen, No. 2019-UP-000760 (S.C. Ct. App. Apr. 28, 2021).

Petitioner timely filed for PCR. App. 253. An amended PCR application was filed asserting additional grounds, including that trial counsel was ineffective in failing to request witnesses be sequestered. App. 280. An evidentiary hearing was held before the Honorable B. Alex Hyman on November 27, 2023. App. 282. Ashley McMahan represented petitioner and Zachary Jones appeared on behalf of the state. App. 282. The PCR court denied relief by written order of dismissal dated May 21, 2024. App. 333 – 334.

This petition follows.

ARGUMENT

The PCR court erred in finding trial counsel effective when he admitted to not requesting the witnesses to petitioner's argument with a homeowner be sequestered when the outcome of the trial turned on witness credibility and whether petitioner entered the home or remained on the threshold during a verbal altercation.

A. How the matter impacted trial.

As noted by petitioner's trial counsel, this case turned on whether the jury believed petitioner entered Saverance's home during a verbal altercation. App. 312, ll. 12 – 24. Petitioner and Saverance both relayed an angry verbal confrontation happened at the Saverance home centered on petitioner's displeasure with the gossip Saverance was spreading about drugs. App. 45, ll. 1 – 6; 133, ll. 14 – 19. Saverance had given inconsistent accounts about petitioner entering the home. App. 104, ll. 2 – 22; 108, l. 2 – 109, l. 23. The testimony of Saverance's son CJ was, in effect, a tiebreaker. Rather than have him sequestered, CJ was allowed to sit in the courtroom while Saverance testified to influence his own testimony. When called to the stand, he effectively adopted Saverance's testimony about petitioner entering the home twice. Tr. 67, l. 5 - 68, l. 7.

B. How the matter was addressed at PCR.

Trial counsel admitted he did not know why he failed to request the witnesses be sequestered:

Q. Did you think about possibly asking for sequestration of the witnesses?

A. I generally do. *I don't know the reason we didn't in this case.* I think it was probably just because they had both given written statements beforehand so we were aware of the testimony. Generally my policy is to sequester witnesses. I think it fairly -- I don't think that the witnesses were in different vantage points or

reasons to separate them. The – but *I don't know why we didn't sequester in this case* but it may have been just because they had both provided written and video recorded statements.

App. 322, l. 21 – 323, l. 7 (emphasis added). Trial counsel nor the state during the PCR hearing contested that CJ had been present during the testimony of Saverance.

C. How the PCR court ruled.

In its ruling, the PCR court found S.C. Code Ann. § 16-3-1550(B) (1997) controlling on this issue since CJ lived in the same home as Saverance and thus was a victim who could not be sequestered. App. 339. In addition, the PCR court ruled any error would be harmless since there was no prejudice. App. 340.

D. How the PCR court erred.

“The purpose of the [sequester] rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a witness violates the order he may be disciplined by the court. The question of the exclusion of the testimony of the offending witness, however, depends upon the particular circumstances and lies within the sound discretion of the trial court.” State v. Huckabee, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010) (*quoting* U.S. v. Leggett, 326 F.2d 613, 613–14 (4th Cir.1964)). Here, trial counsel had no strategic reason to waive sequester, claiming merely that he did not remember why he had not requested sequester and then speculating that it was related to having prior knowledge of the expected testimony. App. 322, l. 21 – 323, l. 7. Trial counsel admitted it was his normal practice to request sequester (“I normally do”) making his failure to do so in the present case unusual. App. 322, l. 21 – 323, l. 7.

The PCR court’s reliance on S.C. Code Ann. § 16-3-1550 (1997) is misplaced. S.C. Code Ann. § 16-3-1550 does state that a “person must not be sequestered from a proceeding

adjudicating an offense of which he was a victim.” However, the indictments at issue here, and the charges petitioner faced during trial, contained a single victim, Jennifer Saverance. App. 345, 347. CJ Saverance was not listed as a victim, and his theoretical status as a “potential” victim of the burglary offense would not have prevented him from being sequestered in the case for which petitioner was actually tried. Under S.C. Code Ann. § 16-3-1550 (1) (1997) the term “victim” under the statutory scheme means “any individual who suffers *direct or threatened physical, psychological, or financial harm* as the result of the commission or attempted commission of a criminal offense, as defined in this section.” CJ was neither harmed nor threatened by petitioner as the verbal altercation solely involved Saverance. While the statute also includes “any individual's spouse, parent, child, or the lawful representative of a victim” such extension is limited to when a victim is either deceased, a minor, incompetent, or physically or psychologically incapacitated. *See* Under S.C. Code Ann. § 16-3-1550 (1) (1997). S.C. Code Ann. § 16-3-1550 cannot be construed as extending blanket protection from sequester from any and all “potential” victims of an offense. To fall within the protections of S.C. Code Ann. § 16-3-1550, the “victim” must be listed as such in the indictment for which a defendant is being prosecuted. The PCR court erred in relying on S.C. Code Ann. § 16-3-1550 and trial counsel was ineffective in failing to request sequester.

“A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution.” Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). “A

reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Since a “party is not entitled to have witnesses sequestered as a matter of right”, it is incumbent on trial counsel to request sequester to prevent witnesses from tailoring their testimony to what they hear during court proceedings. State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000). Since trial counsel lacked any strategic reason for failing to request sequester, counsel was ineffective and fell below the objective standard of a reasonableness.

E. Prejudice.

Trial counsel summarized the case very succinctly during the PCR hearing: “it was largely a domestic disturbance that we felt was overcharged. Brad shouldn’t have been charged with first degree burglary. It was a domestic argument at the cusp of a door. Threshold of a door with his ex-daughter-in-law.” App. 312, ll. 17 – 21. At the heart of the “overcharge” was whether petitioner entered the home. Severance gave inconsistent statements regarding the details of this alleged entry while petitioner was clear that he never stepped a foot over the threshold.

Here, as in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), there is no physical evidence that connects petitioner with the crimes charged and his conviction was based upon testimony of Severance and CJ. As this Court noted in Smalls, “for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and *Harris*—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

Allowing CJ to sit in the courtroom during Severance's testimony reduced the effectiveness of any cross-examination regarding inconsistent versions of events. CJ was allowed to hear Severance's sworn version, that was different and inconsistent with earlier statements she had made. Rather than elicit CJ's uncorrupted testimony, he was allowed to filter his version of events through the lens of Severance. As this case was essentially about credibility, the PCR court erred in finding there was no prejudice.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of *certiorari* to allow full briefing on this issue.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2024.

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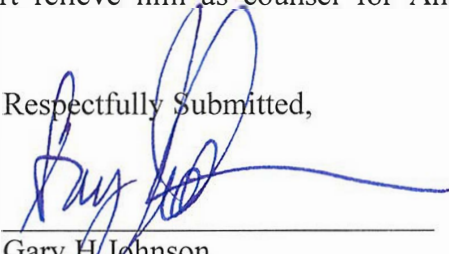
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ansel Bradley Wallen states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge B. Alex Hyman, which was held on Nov. 27, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Ansel Bradley Wallen.

Respectfully Submitted,



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2024.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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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Appellate Defender

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This 25th day of September, 2024.