

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Brooks P. Goldsmith, Circuit Court Judge

WAYNE HANKINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000048

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err finding defense counsel was not ineffective where he failed to request a hearing on his motion for a new trial and failed effectively argue petitioner was prejudiced where the jury foreman had a close relationship with the state's investigator where the investigator sat with the prosecution during the whole of trial?

STATEMENT

Petitioner was indicted at the November 2016 term of the Aiken County Grand Jury for the offenses of assault with intent to commit criminal sexual conduct in the first degree, kidnapping, and possession of a weapon during the commission of a violent crime. App. 1-4. Petitioner's case was called to trial on August 29, 2017, before the Honorable Brooks P. Goldsmith, and a jury. App. 5-286. David Hayes, Barry Thompson, and William McKellar represented petitioner. Ashley Hammack and Samuel Grimes were the assistant solicitors. App. 5.

On August 31, 2017, the jury found petitioner not guilty of the weapons offense but convicted him of assault with intent to commit criminal sexual conduct in the first degree and kidnapping. App. 270, l. 12-25. The court sentenced petitioner to concurrent twelve-year prison terms. App. 278, l. 22—279, l. 2; 287-88.

Thereafter, petitioner filed an application for post-conviction relief (PCR). App. 289-95. On September 5, 2023, an evidentiary hearing was held before the Honorable Heath P. Taylor. App. 318-94. Christopher Geel represented petitioner, and assistant attorney general Cruise Mitchell represented the state. App. 318.

On December 18, 2023, Judge Taylor signed an order denying PCR. App. 401-18. The PCR court found defense counsel was not ineffective for failing to request a hearing or adequately argue petitioner was prejudiced by the jury foreman's relationship with the state investigator. The court specifically found defense counsel made a timely post-trial motion and the issue was preserved for appellate review, thus there was no need for defense counsel to have requested an additional hearing on the matter as the issue was ruled on by the court following arguments from both parties. The court noted the state's investigator was not a witness and was

not present during jury selection. Finally, the court found petitioner failed to show any prejudice. App. 407-09.

This petition follows.

ARGUMENT

The PCR court erred finding counsel was not ineffective where he failed to request a hearing on his motion for a new trial and failed effectively argue petitioner was prejudiced where the jury foreman had a close relationship with the state’s investigator and where the investigator sat with the prosecution during the whole of trial.

Complainant’s trial testimony

The complainant was a twenty-year-old student from Rockville, Maryland attending Paine College in Augusta when she met petitioner at the downtown library in Augusta. It was May 17, 2016, and the complainant was leaving the library. Petitioner was outside the library. “He just started talking to me. He introduced himself and we just started talking. . . . Maybe five minutes. It wasn’t that long.” The complainant was waiting for her ride, and she exchanged phone numbers with petitioner. App. 61, l. 3 – 64, l. 16.

The complainant went to the movies with some friends later in the day. She recalled: “It’s the newest movie about the mummy girl with tattoos on her face. I don’t remember what it was called though.” App. 64, l. 19 – 65, l. 11.

The complainant testified, after the movie petitioner text messaged her asking what she was doing. She responded petitioner that her after movie plans to go out “had got cancelled, and “I told him that we could hang out.” App. 65, ll. 15-24.

The complainant at the time was living with some Augusta University students. Since she was from Rockville, Maryland, she maintained she was not familiar with the area. Regardless, petitioner picked her up and drove towards Aiken. The complainant later claimed she thought they were going to a party at the home of petitioner’s cousin. She apparently made that assertion for the first time at trial. App. 66, l. 1 – 67, l. 22.

The complainant recalled they stopped at a store to buy snacks, beer, and alcohol. Petitioner then drove to his house, which was “on a dirt road in the back of like some trees and it was like a really old house, yeah.” App. 66, l. 1 – 71, l. 25.

Once inside, petitioner put on a movie which the complainant said was about “like a man who robs banks and he was like a part of a group who robbed banks and that’s what they did. They robbed banks. I don’t know.” App. 71, l. 19 – 72, l. 6.

The complainant said while watching the movie they smoked “a small piece of a joint and we kind of like smoked a joint and just talked and just watched the movie and that was pretty much it.” App. 72, ll. 18-23. The complainant’s version and petitioner’s version of what occurred that night were consistent up to this point.

The complainant said after petitioner showed her his dogs in the back yard they went back inside the house, and “he kind of wrapped his arms around me and was trying to be like, you know, [be] affectionate, and I just kind of was like, not into that, just trying to hang out, you know. It’s not – it’s not why I’m here.” App. 73, l. 23 – 74, l. 13.

The complainant related that petitioner continued to make “advances” and “he started rubbing on my leg. He came in, like trying to kiss my neck and was just going over, like, yeah, leaning over.” App. 75, ll. 7-10.

The complainant said she talked to petitioner about his two daughters, and she claimed, “You know, trying to like deescalate it because I know it doesn’t feel good to be rejected. So I was trying to move the conversation forward.” App. 75, ll. 14-22.

The complainant maintained about ten minutes later petitioner left the room. “When he came back in the room, he had a gun with him and was pointing at me and told me to get up and to take my clothes off.” The complainant claimed the gun was “like a gun you see in cowboy

movies, where like they pull the chamber out, they put the bullets in and then they snap it back and kind of like, like push it so it revolves a little bit.” App. 75, l. 14 – 76, l. 22.

The complainant said she was “like in shock for a second” wondering if “this was a joke. I started crying, started panting and then I, like, was trying to figure out some way to bribe him so I was offering my phone.” “Eventually I did take my shirt off.” App. 77, ll. 6-15.

The complainant maintained that petitioner ignored her offers to give him her physical belongings. “He just kept repeating, like, take your clothes off, take your clothes off, like that was it.” App. 77, ll. 16-22.

The complainant claimed petitioner tried to drag her into the bedroom, that she was pulling away from him and she kept tapping his arm to indicate that “like, I couldn’t breathe.” App. 81, l. 4 – 84, l. 2. Petitioner let go of her and the complainant said she grabbed a knife that was on the stereo speaker and “kind of swung around trying to defend myself.” “[I] missed him, fell back down and he grabbed the knife out of my hand.” App. 84, ll. 3-19.

The complainant testified petitioner grabbed the knife by the blade and he “was like, Damn, you cut me, like, look what you did. You cut me, like, I’m done, I’m done. You cut me. Just go grab your stuff and, like, I’ll take you home.” App. 84, ll. 20-24. The complainant said when petitioner went into the room “to collect my stuff . . . I ran out the front door.” App. 85, ll. 19-24.

On cross-examination, the complainant stated she grabbed the knife and swung it at petitioner. She claimed petitioner grabbed the knife out of her hand which cut both of them. She remembered petitioner responded: “I’m done, go get your stuff.” App. 106, l. 15 – 108, l. 16.

The complainant admitted there was not anything in her initial statement to police about going to a party at petitioner’s cousin’s house after petitioner picked her up that night. There

was also no claim of “not feeling right” when they purchased alcohol at the store. Neither was there a mention of petitioner showing the complainant his dogs. App. 108-110. The complainant acknowledged that she must have been wrong about watching a Tom Cruise movie at petitioner’s house, since the movie did not come out until a year after this incident. App. 112, l. 23 – 114, l. 25.

Petitioner’s trial testimony

Petitioner took the stand in his own defense. He was a thirty-year-old welder, and he was at the downtown Augusta library on May 27, 2016, because “I was working on shutdowns and my job was about to end so I was at the library trying to find another gig.” App. 175, ll. 3-23.

Petitioner remembered meeting the complainant. Petitioner acknowledged he exchanged phone numbers with the complainant after their short conversation. “I texted her my name so she could lock my number in her phone. . . . I went to my truck and she texted me back by then and I sent her another text and I left. . . . I went home after that.” App. 176, ll. 4-16.

Petitioner recalled, “We texted the evening. Me and [the complainant].” App. 177, ll. 13-14. “She [the complainant] let me know that she was able to hang out with me because I texted her earlier and asked her if she would be able to hang out and she told me she had plans, but while I was at the hospital, she told me it was cool and I told her once I’d left there I would call her to see what was going on.” App. 177, ll. 18-24.

Petitioner said later that evening he asked the complainant if she wanted to come to his house and the complainant agreed. Petitioner remembered: “I told her, I’m frisky. And she said, I knew you were going to be trouble.” Petitioner picked up complainant, they stopped at a store and bought beer, snacks and alcohol. App. 178, l. 11 – 179, l. 17.

Once at petitioner’s house, “I put a movie on and handed her the rest of the DVD’s and

told her if she saw something she wanted to watch, just let me know I'd put it in." App. 179, ll. 18-22. Petitioner and the complainant's testimony largely matched to this point. Petitioner confirmed that he smoked "a joint" with the complainant and they were both drinking. App. 180, l. 20 – 181, l. 4.

While sitting on the couch, petitioner said he pulled the complainant's leg over his and started rubbing her leg and making out with the complainant. The complainant took off her jewelry and her shirt and told petitioner she had to use the restroom. App. 181, l. 23 – 183, l. 25.

It was at this point that petitioner's testimony of what happened and the complainant's testimony of what occurred diverged. The following occurred on direct examination of petitioner:

Q: [What] happened next?

A: I'm just sitting there drinking my beer waiting on her to come back. When she came back, she sat down and I saw her, I put my beer over in the corner, like it is in the picture so I wouldn't knock it over. And when I turned around, **she turned around with the knife in my face** like, around at the same time and she said you just -- you just want some pussy don't you.

Q: Hold on. Let's -- where was this knife?

A: It was on the TV stand.

Q: Are we talking about the TV stand where the joint and the beer's at?

A: Yes.

Q: Right underneath the TV?

A: Yes.

Q: Why was your knife on the TV stand in the living room?

A: Because I put it there because I was working on my truck earlier, working on my speakers and I cut -- used it to cut the wire because that's the only knife I had. That knife usually is in my truck because I use it at work.

Q: Okay.

A: I didn't find one I just used that knife because it was there.

App. 184, l. 12 – 185, l. 10 (emphasis added).

Petitioner said when the complainant made another comment about him just wanting “[s]ome pussy don’t you.” “I pushed her hand away and told her to get the knife out of my face . . . she was like kind of smirking at me.” App. 185, ll. 17-25.

Petitioner grabbed for the knife and he cut himself in the process. App. 186, l. 3 – 188, l. 5. The two began to wrestle over the knife, and “she told me to get the -- she said get the fuck off her. And she snatched her hand away. She tried to pull her arm away, but I still had her hand and when she snatched her hand, I saw the blood go from my hand over by the TV stand . . .” App. 188, ll. 5-15. *“I told her to give me the knife because if she cut me one more time I was going to mess her up.”* The complainant continued to fight petitioner for control of the knife. As the struggle continued, petitioner “choked [her] a little bit and she released the knife.” “When she released the knife, I told her to go get her stuff so I could take her home.” App. 188, l. 8 – 191, l. 6. Petitioner went and got the complainant’s personal items “and when I turned around she was walking, running out the door.” App. 191, ll. 1-10.

Petitioner said his father later called him and informed him police were at his house and were “going to kick the door in because I tried to rape somebody.” Petitioner tried to find an attorney and “I eventually turned myself in.” “There was no gun, at all.” The jury found petitioner not guilty on the firearm offense. App. 193, ll. 1-17.

Relevant facts

At the conclusion of trial and sentencing defense counsel made a post-trial motion for a new trial. Counsel asserted while speaking to jury members he overheard the jury foreman speaking to the solicitor’s office investigator, Norwood Bodie. From their conversation counsel

gleaned the two were well acquainted a fact not previously known. Counsel asserted had he known of this relationship he would have struck the juror during jury selection. App. 279, ll. 10-25. Counsel also noted Bodie sat with the prosecution during the entire trial. App. 280, ll. 2-5. When offered the opportunity to question the juror, defense counsel declined. App. 282, ll. 11-17; 283, ll. 24-25.

The solicitor responded that Bodie was not present during jury selection, was not listed as a witness in the case, and was not involved in any preparation for the trial other than to “present pictures and to operate the video system.” App. 281, ll. 14-20.

Without any explanation the trial court denied counsel’s motion. App. 284, ll. 1-2.

On September 8, 2017, defense counsel filed a short, written motion arguing due process was violated where the jury was “unlikely to be impartial due to the jury foreman’s relationship with the state’s investigator.” App. 419.

The trial court denied the motion. In the order the court noted that defense counsel failed to submit any brief in support and failed request a hearing in the matter. App. 420.

Discussion

To establish a claim of ineffective assistance of counsel, petitioner must show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (S.C.1992).

If defense counsel had not failed to properly raise and argue petitioner’s motion for a new trial by requesting a hearing and submitting a brief in support of his motion, this issue would have been preserved for appellate review and petitioner would have been successful on appeal.

See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 801 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing the "trial court's ruling through the same lens that would be applied on appeal . . .") (citation omitted).

The rules of preservation are well established, and trial counsel was deficient for failure to make a record that offered petitioner the opportunity for meaningful appellate review. *See Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (stating "it is the responsibility of trial counsel to preserve issues for appellate review.").

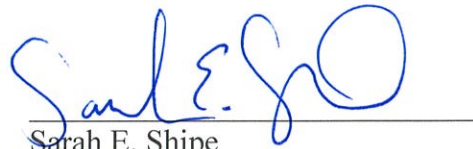
Counsel was deficient where he failed to sufficiently argue and preserve for appeal his motion for new trial based on discovering the jury foreman had a close relationship with the state's investigator. It is true counsel made the motion immediately following his discovery, however he failed to ask the court to make any findings on the record after brief arguments were held. Counsel also failed to request a hearing on the matter or supply the court with a supporting brief in order to fully flesh out his argument that petitioner was prejudiced by this juror's relationship with the state's investigator.

Petitioner was prejudiced by counsel's failure to. The state's case was weak where it was complainant's word against petitioner's and centered on credibility. Having a close friend of the jury foreman sit with the prosecution throughout trial undoubtedly prejudiced petitioner. The PCR court noted in the order that the court asked the jury pool if they knew of any reason why they could not be fair and impartial and this juror responded it did not. However, as the court also noted the investigator was not listed as a witness nor was he present during jury selection. Thus, when the juror was asked if he could be fair and impartial it was prior to his friend, the investigator, being sat with the prosecution.

Had defense counsel requested a hearing on the matter and submitted a supporting brief with his written motion properly preserving the issue for appellate review there is a reasonable likelihood petitioner would have been successful on appeal.

CONCLUSION

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



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of October, 2024.