

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

OCT - 2 2013

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

S.C. Supreme Court

LEROY BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000498

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 14

ISSUE PRESENTED

Did trial counsel's failure to advise Petitioner of his continued Fifth Amendment right to remain silent during the mitigation phase of sentencing after trial violate Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where the South Carolina Court of Appeals dismissed Petitioner's meritorious direct appeal because it interpreted Petitioner's statements at sentencing after trial as an admission of guilt?

STATEMENT

A Richland County Grand Jury indicted Petitioner at the February 20, 2008 term of General Sessions for first degree burglary and petit larceny. App. 361-362; App. 365-366. Petitioner's case was called to trial on December 10, 2008 before the Honorable Clifton Newman and a jury. App. 1. Assistant Solicitors Daniel Goldberg and Richard Cathcart appeared on behalf of the prosecution, and Luke Shealey and Michael Leddy represented Petitioner. App. 1. On December 11, 2008, the jury found Petitioner guilty of first degree burglary, but not guilty of petit larceny. App. 250, ll. 14-21. He was sentenced by the Honorable Clifton Newman to eighteen years. App. 271, ll. 14-24; App. 363.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Brown, Op. No. 2011-UP-041 (S.C. Ct. App. Filed February 1, 2011); App. 274-275. The subsequent Petition for Rehearing was denied by order filed March 24, 2011. A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court on May 25, 2011. The state filed a Return on June 21, 2011. By order dated February 8, 2012, the South Carolina Supreme Court denied certiorari. App. 276.

On May 8, 2012, Petitioner filed an Application for Post-Conviction Relief (PCR). App. 277-281. For whatever reason, Petitioner filed a duplicate Application for Post-Conviction Relief on June 15, 2012. App. 282-287. The two actions were merged by an Order for Merger dated June 25, 2012. App. 288-289. The state filed a Return dated July 13, 2012. App. 290-296.

The matter proceeded to an evidentiary hearing on January 13, 2013 before the Honorable G. Thomas Cooper. App. 297-349. Assistant Attorneys General John Walter Whitmire and Rob D. Corney represented the state, and H. Flynn Griffin, III represented Petitioner. App. 297. By order dated February 15, 2013, Judge Cooper denied Petitioner relief. App. 350-359.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to advise Petitioner of his continued Fifth Amendment right to remain silent during the mitigation phase of sentencing violated Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where the South Carolina Court of Appeals dismissed Petitioner's meritorious direct appeal because it interpreted Petitioner's statements at sentencing after trial as an admission of guilt.

Evidence at Trial

Homeowner Regina Monteith testified that she "had come in to some funds" and decided to do some "deferred maintenance" on her home. After remodeling the kitchen, she hired a contractor to paint the exterior trim of her brick home. App. 42, ll. 11-19. On the morning of Monday, October 29, 2007, she received a phone call from one of the painters, Gerald Boykin. Mr. Boykin informed Monteith that when he arrived at her house that morning he had found her purse on the front lawn, a back window opened, and a ladder leaning up against the home. App. 45, ll. 13-19. Monteith testified that the painters were "meticulous about putting all the ladders into a big pile" at the end of the day and that they never left any ladders leaning up against the house. App. 45, l. 23 – 46, l. 1. She further testified that all the windows were closed the night before when she went to bed. App. 45, ll. 20-22.

Boykin, the subcontractor and foreman, testified that at the end of the day on Friday, October 26, 2007, his crew stacked the ladders by a tree away from the house and locked them with a chain lock. App. 79, ll. 4-11; App. 89, l. 12 – 90, l. 6. *Only* Boykin or a member of his crew had access to unlocking the ladders. App. 90, ll. 1-3. Boykin further testified that all the windows "should have been locked." At the end of each day he either personally entered the home to lock

the windows or he called Monteith to make sure she locked the windows. App. 78, ll. 16-21; App. 87, ll. 20-22; App. 88, ll. 5-21.

After learning her purse was discovered on the front lawn and observing the opened window and ladder propped against the house, Monteith immediately called 911. The Columbia Police Department responded to her home and, after officers took an initial report, crime scene investigators arrived to process the scene. App. 54, l. 2 – 55, l. 18.

Investigator Gerald Bradley of the Columbia Police Department processed the scene. App. 93, l. 17 – 94, l. 12. He took photographs of the home and then looked for latent fingerprints on the window, which was the point of entry, and the ladder. Several latent fingerprints were lifted from the inside of the window, including from the wood framing. He did not look for fingerprints on the purse due to its textured surface. No latent fingerprints were found on the ladder. App. 98, l. 12 – 103, l. 3.

Investigator Peter Currie of the Columbia Police Department was qualified as an expert in fingerprint analysis without objection. App. 130, l. 14 – 131, l. 20. Through his analysis and comparisons, Currie concluded one of the latent prints lifted from the window was a “one hundred percent match” to Petitioner’s fingerprint. He testified, “There is no doubt that this is [Petitioner’s] fingerprint.” App. 132, l. 21 – 133, l. 6; App. 135, ll. 19-21. When questioned by defense counsel, Investigator Currie conceded that he could not determine when the print was placed on the window and, therefore, could not age it. App. 136, ll. 8-18.

At the close of the state’s case, defense counsel moved for a directed verdict because there was only one piece of evidence offered in the case (the fingerprint match) that was used to link Petitioner to the burglary. Thus, defense counsel argued there was not enough circumstantial evidence tending to prove Petitioner was guilty of committing the offense of burglary. First, the

fingerprint evidence was not dated and, thus, the state could not put Petitioner at the scene at the time of the burglary. Also, there were multiple crew members (approximately six males)¹ who had access to Monteith's house and the ladder found propped up against the window. The foreman testified the crew locked up the ladders every evening, which would negate Petitioner's ability to obtain a ladder from the yard, and cast suspicion on the crew members. App. 160, l. 16 – 171, l. 10. Nevertheless, the trial judge denied the directed verdict motion and the defense went on to present its case. App. 168, l. 10 – 169, l. 12; App. 171, ll. 11-12.

Petitioner testified that sometime during the month of October 2007 he stopped by Monteith's home seeking part-time work after he saw the "big old sign" out front. App. 187, ll. 14-25. He walked around to the back of the home looking for someone to talk with about possible employment. He ran into a crew member working on the window that was used as the point of entry. App. 188, ll. 7-20. Petitioner testified he began to "pitch" himself by demonstrating to the man his knowledge of painting. Petitioner discussed with the man the importance of identifying the condition or age of the wood and what type of paint would be appropriate to use. App. 190, l. 12 – 194, l. 1. Petitioner testified that in the process of explaining his knowledge of painting he touched the window. App. 194, ll. 16-21. The crew member told him "flat out" they had no work for him and Petitioner eventually left. App. 195, l. 5 – 196, l. 7. When Petitioner was specifically asked if he committed the burglary he responded with the answer "no." App. 196, ll. 23-25.

There was insufficient evidence presented at trial to prove Petitioner returned to the home later and committed the offense of burglary. Defense counsel renewed its motion for a directed verdict at the end of its case based on the same grounds as previously argued, but the motion was again denied by the judge. App. 200, ll. 11-17.

¹ Boykin testified he had six men working on Monteith's home. App. 77, ll. 14-16.

Sentencing

Despite the lack of both direct evidence and substantial circumstantial evidence, the jury returned a guilty verdict for first degree burglary. However, the jury found Petitioner not guilty of petit larceny. App. 250, ll. 14-21. During sentencing, Petitioner and the trial judge engaged in a lengthy colloquy. The two discussed Petitioner's prior convictions and drug use. They also discussed Petitioner's recent interest in religion and his desire to teach youth not to make the same mistakes he made. App. 258, l. 15 – 271, l. 24. Specifically, the trial judge questioned Petitioner:

THE COURT: When you committed this burglary, you were how old?

PETITIONER: 51.

App. 265, l. 24 – 266, l. 1.

The trial judge ultimately sentenced Petitioner to eighteen years. The judge explained, "I started to give you twenty-five. I thought about thirty. I thought about twenty. But you've made good impressions. But it is just unfortunate that you decided to be a burglar. So I am going to give you eighteen." App. 271, ll. 14-24.

Direct Appeal

Petitioner's appellate counsel, Wanda H. Carter, argued on direct appeal that the trial judge erred in denying Petitioner's motions for a directed verdict because there was no substantial circumstantial evidence presented from which it could fairly and logically be deduced that Petitioner was guilty of burglary. The South Carolina Court of Appeals affirmed Petitioner's conviction in a one paragraph unpublished opinion:

PER CURIAM: Leroy Adams Brown appeals his conviction for burglary in the first degree, arguing the trial court erred in denying his motion for a directed verdict. We affirm pursuant to Rule

220(b)(1), SCACR, and the following authorities: State v. Weston, 367 S.C. 279, 292-293, 625 S.E.2d 641, 648 (2006) (explaining if any direct evidence or substantial circumstantial evidence reasonably tends to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury); State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) (“Any doubt about the correctness of [affirming the appellant’s conviction] is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that he had participated in the robbery . . . Further review of the record, therefore, is rendered unnecessary.”).

App. 274-275.

It is clear from the opinion that the Court of Appeals affirmed Petitioner’s conviction, and perhaps did not fully consider his arguments, because it concluded Petitioner admitted guilt during sentencing after he was convicted at trial.

Additionally, in its return to Petitioner’s petition for writ of certiorari to this Court on direct appeal, the state argued that any trial error would have been harmless beyond a reasonable doubt because Petitioner allegedly admitted guilt in open court during the sentencing proceeding. See Supp. App. 8.

Evidence at PCR

Petitioner’s testimony at the PCR hearing was consistent with his testimony at trial. He testified at PCR that he pled not guilty to the charges and had consistently maintained his innocence. App. 309, ll. 19-23. Petitioner explained that when the jury returned a verdict of guilty for first degree burglary he was “stung” and “in a state of shock” because he knew the charge carried the possibility of a life sentence. “So while I’m standing there Judge Newman asked me a question, how old were you when you committed the crime. At that time I didn’t even understand what he was saying. I think he asking me how old was I when I got arrested so I told him I was fifty-one years old. So during my direct appeals and all this here they use that against me. They saying I

admitted guilt.” App. 309, ll. 7-18. Petitioner further testified that his trial counsel did not correct him after he responded that he was fifty-one years old. App. 309, l. 24 – 310, l. 1.

Petitioner’s trial counsel, Luke Shealey, also testified at the PCR hearing. He was an Assistant Public Defender at the time of trial and was appointed to represent Petitioner. He had only been practicing law for two years at the time of trial. Trial counsel testified that Petitioner’s trial was the first trial he had lost and thus his first sentencing proceeding after a trial. App. 318, ll. 3-25; App. 328, ll. 8-10. Trial counsel explained that the defense strategy at trial was to suggest one of the crew members committed the burglary because they had access to the ladders while Petitioner did not.

Trial counsel testified that “as long as I’d represented [Petitioner] he always maintained that he did not do it . . .” App. 323, ll. 1-4. Trial counsel further explained, “This is a pretty strong, in my opinion, circumstantial case and the Court of Appeals didn’t even address those issues because they felt he admitted guilt during sentencing . . . they didn’t address the issue on appeal because I allowed [Petitioner] to seemingly admit that he did this burglary when questioned by Judge Newman. I didn’t counsel him to remain silent . . . I didn’t even realize perhaps that he still had a Fifth Amendment right to remain silent and the right to my counsel at that point . . .” App. 323, ll. 15-24; App. 327, l. 9 – 328, l. 22. Trial counsel concluded that he “wouldn’t have allowed [Petitioner] to talk so freely” about his “alleged guilt” if he would have properly understood the dangers. *Id.*

Trial counsel *never* indicated *any* valid strategy for failing to advise Petitioner of his Fifth Amendment right to remain silent and allowing Petitioner to talk so freely at sentencing. Rather, he testified that he didn’t even realize Petitioner still had a Fifth Amendment right to remain silent at

that stage and that he would have “treat[ed] it differently today.” App. 328, ll. 19-20; App. 332, l. 21 – 333, l. 24.

Order of Dismissal

The PCR court concluded Petitioner failed to establish any constitutional violations or deprivations that would require the court to grant his application. Specifically, the court stated trial counsel articulated valid strategic reasons for allowing Petitioner to admit guilt during the sentencing phase of trial and that trial counsel’s successful presentation during mitigation led the trial judge to impose a lesser sentence than initially contemplated. Further, the PCR court found Petitioner failed to prove that his “ownership of guilt was outcome determinative in the Court of Appeal’s decision to affirm the trial judge’s denial of trial counsel’s directed verdict motion.” App. 357.

Discussion

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to advise Petitioner of his continued Fifth Amendment right to remain silent during the mitigation phase of sentencing at the conclusion of his trial. The PCR court erred in finding trial counsel articulated valid strategic reasons for such failure.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel failed to advise Petitioner of his Fifth Amendment right to remain silent at sentencing and even admitted at the PCR hearing that he did not realize Petitioner still had such rights. See App. 328, ll. 12-16. Trial counsel failed to advise Petitioner of the dangers of speaking so openly and freely after his conviction. The PCR court's Order of Dismissal is wholly incorrect in its assertion that "trial counsel articulated valid strategic reasons for allowing [Petitioner] to admit guilt and display remorse during the sentencing phase of [Petitioner's] trial." App. 357. Nothing in trial counsel's testimony at the PCR hearing could be interpreted as a valid reason for not advising Petitioner of his rights. Rather, trial counsel testified, "I feel that I failed [Petitioner] at that point by not counseling him to remain silent" and that he "certainly would treat it differently today." App. 323, ll. 17-18; App. 328, ll. 19-20.

Petitioner was prejudiced because trial counsel's failure to advise Petitioner of his Fifth Amendment right to remain silent during sentencing cost Petitioner his direct appeal. There is a reasonable probability that the Court of Appeals would have ruled differently if the court did not interpret Petitioner's responses during sentencing as him admitting guilt. If trial counsel would have properly advised Petitioner of his Fifth Amendment right to remain silent or cautioned him not to speak so freely at sentencing, the outcome of his direct appeal would very likely have been

different for the state's case at trial lacked both direct evidence and *substantial* circumstantial evidence.

In State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000), the Supreme Court affirmed the Court of Appeals ruling that a directed verdict should have been granted because the only evidence of burglary was the defendant's fingerprint on a window screen that was propped up against the house as it proved neither entry nor burglary. In Mitchell, the Court's holding was fortified by the fact that the defendant had been to that house on prior occasions as Petitioner similarly testified that he had been to Monteith's home previously inquiring about employment.

Compare also State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), where the exclusively circumstantial evidence was found to have been insufficient to support a conviction as the only evidence presented against the accused was his fingerprint on a coffee cup found inside the deceased's car and where the accused's only contact with the deceased was when the deceased visited the accused's roommate for sex.

Additionally, compare State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), where a directed verdict motion was granted because the items found around the deceased couple's home did not amount to substantial circumstance evidence of the accused's guilt. For example, in Schrock, a cigarette butt found at the scene was not connected to the defendant, a shoe print found at the crime scene was not connected to the defendant's shoes, and a hand print at the scene was not found to have belonged to the defendant.

Furthermore, compare State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), where this Court held a directed verdict should have been granted because the evidence presented at trial merely raised a suspicion of guilt. The state accused Bostick of killing his neighbor and burning down her home. The state presented the following circumstantial evidence at trial: (1) the

neighbor's personal items were found in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; and (3) investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to the neighbor's DNA. This Court held that this evidence was insufficient to survive a directed verdict motion.

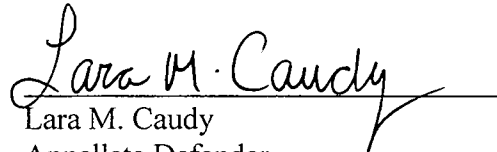
Finally compare State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) where the exclusively circumstantial evidence was found to have been insufficient to support a conviction for burglary as the only evidence presented against the defendant was (1) that less than ninety minutes after the burglary, police located the defendant in the getaway car with the burglars and the stolen goods; (2) the defendant fled from law enforcement, and (3) the defendant asked an uninvolved person to lie for him. In Odems, this Court recognized there is a well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. 395 S.C. 582, 592, 720 S.E.2d 48, 53.

Similar to the above cited cases, the evidence presented by the state in Petitioner's case raised, at most, a mere suspicion that Petitioner committed the burglary. There is a reasonable probability that but for trial counsel's failure to advise Petitioner of his Fifth Amendment right to remain silent at sentencing, the Court of Appeals on direct appeal would have held the circuit court erred in denying Petitioner's motions for a directed verdict. Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
G. Thomas Cooper, Circuit Court Judge

LEROY BROWN,

PETITIONER,

V.

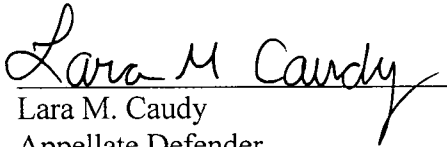
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000498

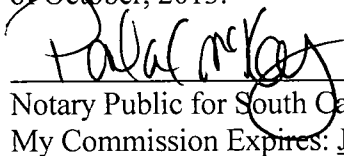
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 2nd day of October, 2013.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of October, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.