

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

RECEIVED

OCT - 4 2013

S.C. Supreme Court

LEWIS ADDIS, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000047

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief 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 OF FACTS 3

ARGUMENT 7

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL..... 11

ISSUE PRESENTED

Was defense counsel ineffective for failing to investigate whether petitioner, in fact, had the predicate prior two housebreaking or burglary convictions to be eligible for an indictment for burglary in the first-degree, since counsel's reliance on the fact that petitioner may have stolen a gun during the burglary was insufficient to negate the necessity of an investigation, particularly since petitioner was indicted for first degree burglary because of his alleged two prior convictions, and not because he allegedly stole a gun during the burglary?

STATEMENT OF FACTS

Petitioner was indicted at the July 14, 2010, term of the Richland County Grand Jury for offenses of burglary in the first-degree and petit larceny. The burglary in first-degree indictment alleged petitioner entered a dwelling and that he had “a prior record of two or more convictions for burglary, housebreaking or a combination of both.” The petit larceny indictment alleged he stole “prescription drugs” during the daytime burglary. App. 115–117.

Petitioner appeared on April 14, 2011, before the Honorable James R. Barber, III. Jennifer Davis represented petitioner. Kathryn “Luck” Campbell was the assistant solicitor. App. 1.

Campbell told the judge that petitioner was pleading guilty to burglary in the first-degree and petit larceny and that sentencing would be deferred. App. 3, ll. 1 – 9. During the guilty plea proceeding, petitioner was informed the petit larceny indictment arose during the burglary because he took less than a thousand dollars of prescription drugs from the victim. App. 12, ll. 8 – 24. There was, as seen above, no mention of being armed in the indictment as an element of burglary in the first degree.

Campbell told the judge that the co-defendant, Casey Chavis, implicated petitioner in the burglary. It was undisputed the burglary occurred during the daytime. Campbell said petitioner confessed to his role in the burglary but he denied stealing a handgun and other items. He did admit stealing prescription drugs. Sentencing was deferred. App. 13, l. 10 – 14, l. 3.

The sentencing hearing was convened on May 24, 2011, before Judge Barber. Jennifer Davis again represented petitioner and Luck Campbell was again the solicitor at this hearing. App. 16.

Campbell told the judge that “the reason this was a burglary in the first-degree, your honor, is because he does have two or more convictions for housebreaking and/or burglary. He was also a

potential life without parole person as part of the plea concessions in this case.” App. 18, ll. 16 – 19. Campbell maintained that petitioner was convicted of “breaking and entering” in 1978. He was also convicted of three counts of “housebreaking. He did a nine-year active sentence on that.” App. 22, ll. 23 – 23, l. 6.

Defense counsel Davis reminded the judge that the burglary here occurred during the daytime when no one was home. Petitioner had a very bad substance abuse problem. She therefore asked that Judge Barber to suspend the mandatory fifteen year prison sentence to probation “to allow him to complete the Bethel House–Victorious Overcomer’s program.” The judge said that he did not know anything about this rehabilitation program. App. 25, l. 14 – 27, l. 19.

Davis then explained that petitioner had been screened for the program and accepted into it. The judge stated that he did not think a suspended sentence for petitioner to enter into this rehabilitation program was “going to work I’m not going to do that ... he’s going to prison and the only question is is he going to get out.” App. 28, ll. 4 – 25. Judge Barber then sentenced petitioner to fifteen years in prison. App. 35, ll. 18 – 21.

Petitioner filed an application for post-conviction relief dated November 28, 2011. App. 38 – 50. The state filed a return on December 12, 2011, requesting that the Court convene an evidentiary hearing. App. 52 – 58.

An evidentiary hearing was then held on October 18, 2012, before the Honorable Clifton B. Newman. Robert Corney was the assistant attorney general. Tommy Thomas represented petitioner. App. 59.

Petitioner testified that he only had one burglary conviction in his past, which was in 1978, when he was eighteen-years-old. App. 68, l. 12 – 69, l. 7; App. 71, ll. 3 – 17; App. 77, ll. 5 – 11. Petitioner said he expected that he would receive a suspended sentence from Judge Barber for the

present burglary, and that he would enter rehabilitation as had been discussed with Counsel Davis. Petitioner's main assertion was that he did not have two prior burglary or housebreaking convictions and therefore he should not have been indicted for first degree burglary or been threatened with being served a life without parole notice. App. 79, ll. 17 – 81, l. 10.

Defense counsel Davis admitted she did not investigate whether petitioner had two prior burglary or housebreaking convictions:

Q. Okay. Were you able to look into his criminal background to verify that he did, in fact, have two priors, if that was the basis that they were bringing the indictment on?

A. *I did not do an independent look of anything. I looked solely at the rap sheet that was provided.* I did talk with Mr. Addis about his rap sheet.

Q. Okay. When you spoke with him about it, what was his, what was his kind of standpoint on the prior charges?

A. *I mean, I'm not a hundred percent.* I do recall him talking about the parole and the dates being all of the same nature. At that point, *I was more concerned about the allegation of the gun making it a burglary first.*

App. 84, l. 21 – 85, l. 8. (emphasis added).

As seen, the indictment alleged the aggravating element for first degree burglary was petitioner allegedly having two prior burglary or housebreaking convictions. App. 115. Further, defense counsel Davis admitted the entire matter of petitioner stealing a gun was “questionable. I certainly would have argued that there was no gun, or that they couldn't prove that a gun had been taken.” App. 90, ll. 17 – 23. Petitioner was not indicted for committing the burglary with a firearm or having a firearm at any point during the burglary anyway.

An order of dismissal was filed on December 11, 2012. This order stated that defense counsel was concerned because the state was “standing by” the use of a weapon as a basis for the

first-degree classification of the burglary. The order of dismissal also acknowledged defense counsel did not do any independent investigation of the prior burglaries or housebreakings. App. 108. Nonetheless, the PCR court concluded defense counsel provided effective representation in this case. App. 99-113.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

Defense counsel was ineffective for failing to investigate whether petitioner, in fact, had the predicate prior two housebreaking or burglary convictions to be eligible for an indictment for burglary in the first-degree, since counsel's reliance on the fact that petitioner may have stolen a gun during the burglary was insufficient to negate the necessity of an investigation, particularly since petitioner was indicted for first degree burglary because of his alleged two prior convictions, and not because he allegedly stole a gun during the burglary.

Discussion

In Walker v. State, 397 S.C. 220, 723 S.E.2d 610 (Ct.App. 2012), the Court found defense counsel was ineffective, and failed in her duty to investigate a potential alibi witness. The Court found that trial counsel did not do anything *personally* to investigate the witness. Her claim was that the investigator was exploring the alibi witnesses matter in that case.

Here, defense counsel also admitted she did not make any effort to personally investigate petitioner's assertion that he only had one prior housebreaking or burglary conviction, and that the NCIC was not accurate. It is common knowledge that the NCIC is often not accurate as to prior convictions, and that prior arrests and other procedural anomalies may be part of a defendant's "rap sheet."

Petitioner's claim is significant since if he only had only one prior housebreaking or burglary conviction then the indictment alleging he had two prior burglary convictions or housebreaking convictions would not only be inaccurate but insufficient to charge first degree burglary. See S.C. Code §16-11-311 (A)(2). Further, it would underscore the deficiency of defense counsel thinking she could rely on the state's allegation that petitioner stole a gun during the burglary which made it first-degree burglary because petitioner was "armed" during the burglary.

See S.C. Code §16-3-311 (A)(1)(a); State v. McCaskill, 321 S.C. 283, 468 S.E.2d 81 (Ct.App. 1996).

The major problem with counsel's reliance on the firearm allegation was two-fold. First, petitioner was not indicted and not on notice that the state may try to allege he was armed with the victim's stolen gun when he left the house to justify the first-degree burglary indictment since the indictment did not allege that element of first-degree burglary. Second, defense counsel candidly admitted she would have put the state to its proof on the stolen gun allegation had petitioner gone to trial.

In Ard v. Catoe, 372 S.C. 318, 642, S.E.2d 590 (2007), this Court held, "without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation.'" Ard v. Catoe, 372 S.C. 331, 642 S.E.2d at 597 *citing* Thompson v. Wainwright, 787 Fed.2d 1447, 1450 (Eleventh Circuit 1986). Here, whether or not petitioner had a prior housebreaking or burglary conviction was critical to his decision whether to go to trial or plead guilty. That was true as to both that element of first-degree burglary, and the state's alleged threat to seek a life without parole sentence based on petitioner's prior burglary or housebreaking convictions.

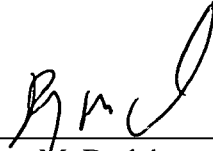
Consequently, doing some investigation on petitioner's alleged prior burglary or housebreaking conviction(s) was reasonable, and the failure to make any inquiry into it or them was unreasonable. Defense counsel was ineffective for failing to investigate petitioner's prior record since it was a crucial part of his case, and for erroneously thinking that the state may be able to belatedly present evidence he stole a gun during the daytime burglary which would satisfy an element of first-degree burglary where petitioner was not indicted under that subsection of the

burglary statute. See, Strickland v. Washington, 466 U.S. 668 (1984). Petitioner's guilty plea should be vacated.

CONCLUSION

By reason of the foregoing argument, petitioner's guilty plea should be vacated and this case remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

LEWIS ADDIS, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000047

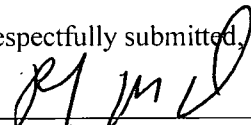
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lewis Addis, Jr. states:

1. He is the Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 18, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Lewis Addis, Jr..

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of October, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

LEWIS ADDIS, JR.,

PETITIONER,

V.


STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000047

CERTIFICATE OF SERVICE

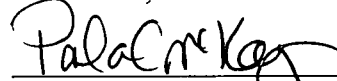
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Lewis Addis, Jr., #095373, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827 this 4th day of October, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of October, 2013.

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