

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to York County
Edgar W. Dickson, Circuit Court Judge

TRAVIS D. ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000866

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel's failure to request a continuance to allow time to properly investigate a new lead regarding the identity of the shooter violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where Petitioner and his co-defendant identified another individual with the same hairstyle and build as Petitioner as the actual shooter shortly before the start of trial and where the state alleged at trial that Petitioner was the shooter?

STATEMENT

A York County Grand Jury indicted Petitioner at the June 12, 2008 term of General Sessions for attempted armed robbery, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. App. 844-849. Petitioner's case was called to trial on August 4, 2008 before the Honorable John C. Hayes, III, and a jury. Petitioner was tried jointly with his co-defendant, Quinton Tobbie. App. 11, ll. 15-21. Assistant Solicitors E.B. Springs and Chris Epting appeared on behalf of the prosecution, and Gary Lemel and Melissa Inzerillo represented Petitioner. App. 1-2. On August 6, 2008, the jury found Petitioner guilty of all charges as indicted. App. 736, l. 20 – 737, l. 5. He was sentenced by Judge Hayes to twenty years for attempted armed robbery, twenty years concurrent for assault and battery with intent to kill, and five years concurrent for the weapons charge. App. 752, ll. 7-24; App. 850-852.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by LaNelle Cantey DuRant. App. 829-841. The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Robinson, Op. No. 2011-UP-022 (S.C. Ct. App. Filed January 25, 2011); App. 842-843.

On December 12, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 755-762. The State filed a return to this application dated March 30, 2012. App. 763-769. The matter proceeded to an evidentiary hearing on October 10, 2012 before the Honorable Edgar W. Dickson. App. 770-818. Assistant Attorney General J. Rutledge Johnson represented the state, and Julia Bass represented Petitioner. App. 770. By order dated February 7, 2013, Judge Dickson denied Petitioner relief. App. 819-828.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to request a continuance to allow time to properly investigate a new lead regarding the identity of the shooter violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where Petitioner and his co-defendant identified another individual with the same hairstyle and build as Petitioner as the actual shooter shortly before the start of trial and where the state alleged at trial that Petitioner was the shooter.

Relevant Facts

On the night of September 7, 2007, Petitioner and his co-defendant, Quinton Tobbie, rode with two acquaintances from Charlotte to South Carolina to purchase gasoline. In his statement to police, Petitioner stated Tobbie and the front passenger got out of the vehicle and went inside the store. After several minutes, Tobbie got back into the car and the front passenger pumped gas. Petitioner said when the front passenger finished pumping gas, he approached a black vehicle parked on the other side of the pump, attempted to rob the passenger of that vehicle, and then shot him. Petitioner stated the front passenger then ran back to their car, jumped inside, and they headed back to North Carolina via I-77.

Petitioner and Tobbie were apprehended a couple hours later at an apartment complex in Charlotte. App. 501, l. 17 – 502, l. 17. Petitioner had a semiautomatic pistol in his right back pocket. App. 401, l. 17 – 402, l. 6. At that time, Petitioner was unable to name the driver or front passenger of the vehicle he travelled in that night and the two were never apprehended. App. 503, ll. 2-7. As best as can be discerned from the record, Petitioner and Tobbie were only acquaintances with the driver and front seat passenger and did not know them.

Tobbie's written statement corroborates Petitioner's account of events. He also identified the front passenger of their vehicle as the shooter. App. 506, l. 14 – 507, l. 23. Tobbie likewise was unable to name the driver or front passenger. App. 508, ll. 9-13.

Sergeant Douglas Wayne Smith of the York County Sheriff's Office testified he responded to the Shell Station on Gold Hill Road in Fort Mill around 10:45 p.m. in regards to an armed robbery and shooting. App. 188, l. 22 – 189, l. 16. When he arrived at the scene he found a man lying on the floor of the convenience store with a bloody rag to his abdomen. This man was later identified as Savalas Dodd. Dodd had a single gunshot wound to his stomach. App. 312, l. 2. Sergeant Smith spoke to a few witnesses and received a description of the suspects and getaway car. App. 198, l. 13 – 199, l. 4. One of these witnesses was Melinda Parker, a clerk at the Shell Station.

Parker testified she was changing the trash bags outside near the gas pumps when she saw a black male with dreadlocks walk over to the passenger side of a black SUV. After a struggle, she heard a "pop" and the man with dreadlocks ran back to a burgundy car and the vehicle took off. App. 278, ll. 6-24; App. 292, l. 22 – 294, l. 7; App. 298, l. 25 – 299, l. 23.

Shortly after the police arrived, they told Parker they had the "shooter" and asked her to go to Charlotte to identify him. Parker testified, "They said they caught them. They wanted me to come identify them." She travelled with a York County detective to Charlotte where she remained seated in the police car. The police took Petitioner out of a patrol car in handcuffs and shined headlights on him. App. 116, ll. 13-25; App. 280, l. 14 – 281, l. 24; App. 302, l. 10 – 304, l. 13. Parker said he was the shooter. Parker also identified Petitioner as the shooter in the courtroom during her testimony. App. 279, ll. 11-17.

Dodd, the man who was shot, testified that he and a friend, Nicole Howie, travelled to the Shell Station that night in Howie's black SUV to purchase gasoline. App. 312, ll. 11-22. Dodd was

the passenger and Howie was the driver. Howie never got out of the vehicle. App. 313, ll. 2-11. After Dodd purchased items from the convenience store and pumped gas, he got back into the front passenger seat and closed the door. Immediately after he closed the door, a black male with dreadlocks opened the door, pointed a gun at him, and demanded Dodd give him his money. As Dodd was reaching into his pocket for money, the man shot him in the abdomen. App. 314, l. 11 – 317, l. 317. He was taken to the hospital without identifying anyone as the shooter. Dodd identified Petitioner as the shooter for the first time in court during his testimony. App. 318, ll. 16-22; App. 325, l. 24 – 327, l. 10. He never gave a written statement, never gave the police a description of the shooter, and was never shown a photo-lineup. App. 326, l. 11 – 327, l. 13.

Howie testified that as Dodd was getting back into her car after pumping gas, a black male with dreadlocks approached the passenger side with a gun and said, “Give me that money.” App. 338, l. 6 – 339, l. 8. The gun went off and Dodd turned to her and said, “I have been shot.” App. 340, ll. 4-9. The shooter then ran to a burgundy car and the car took off quickly. App. 340, l. 10 – 341, l. 6. After law enforcement and EMS arrived, Howie rode with Dodd in an ambulance to the hospital. App. 355, ll. 15-24.

While at the hospital, Howie was asked by a Charlotte-Mecklenburg police officer to identify suspects in custody. She travelled with a uniformed patrol officer to an apartment complex in Charlotte. The police took Petitioner out of the police car with handcuffs on and had him stand under a street light. Howie identified him as the shooter. She also identified Petitioner as the shooter in the courtroom at trial. App. 343, l. 6 – 344, l. 25; App. 356, ll. 2 – 357, l. 11.

The semiautomatic pistol found on Petitioner did not match the bullet recovered from Dodd’s body. It was *not* the gun used to shoot Dodd. App. 636, ll. 4-16. The investigation indicated a revolver, rather than a semiautomatic pistol, was most likely used to shoot Dodd because

no shell casings were found at the scene. App. 462, ll. 8-14. Additionally, Petitioner had no gunshot residue on his hands. App. 434, ll. 6-13; 614, ll. 5-8.

The defense theory of the case was consistent with Petitioner's written statement, which was that Petitioner and Tobbie were passengers in the car involved in the shooting, but that the front seat passenger was the shooter and that Petitioner had no knowledge of his plan. App. 795, ll. 2-21. The defense strategy was to challenge the eyewitness identification of Petitioner as the shooter. The defense presented the testimony of Lori Van Wallendael, an expert in the psychology of eyewitness identification, who explained the inherent unreliability of police show-ups and the importance of obtaining an initial description before the witnesses' memory is distorted by questions and what other people tell them. App. 580, l. 4 – 584, l. 19; App. 600, l. 600 – 601, l. 10.

Evidence at PCR

Petitioner testified that a day or two before trial, trial counsel's private investigator approached Petitioner with a booking photograph of an inmate from the Charlotte-Mecklenburg County Detention Center. Petitioner explained that he identified this individual as the "actual shooter." App. 775, l. 23 – 776, l. 24; App. 777, l. 23 – 778, l. 5. On the morning of the first day of trial, Petitioner spoke with trial counsel about the newly discovered identity of the shooter. Petitioner inquired "what was being done about it? Was there any way [we] were going to get that in and he told me it was too late. It was nothing we could do about it." App. 778, ll. 6-25. Petitioner further testified that trial counsel should have requested a continuance to investigate the true identity of the shooter. He stated, "I am pretty sure that once all the facts came together it would have turned out to be proven that that was the actual shooter . . . he could have been the one on trial for this instead of me." App. 779, ll. 1-21.

Trial counsel explained that he was contacted by Geoffrey Dunn, counsel for Petitioner's co-defendant, Quinton Tobbie, right before trial. Mr. Dunn informed trial counsel that Tobbie had obtained a photograph of a man who Tobbie identified as the actual shooter. The photograph was a booking photograph of a man from the Charlotte-Mecklenburg Detention Center. App. 797, ll. 4-16. The man had the same body type as Petitioner and looked very similar to Petitioner. App. 797, ll. 17-20. Dunn wanted trial counsel to show the photograph to Petitioner to see if Petitioner recognized the man. Trial counsel had his investigator meet with Petitioner who confirmed the man in the photograph was the actual shooter. App. 797, ll. 12-14.

Trial counsel stated at the PCR hearing that "I did not ask for a continuance. I don't know why. I can't tell you why I didn't ask for a continuance at that point in time to explore that." He explained further that he foresaw issues with obtaining an out of state subpoena for the individual and with arguing third party guilt if the newly identified shooter did not admit guilt. When questioned by the attorney general, trial counsel also stated he did not think the trial judge would have granted a continuance even if he had requested one. App. 798, l. 24 – 799, l. 3. Trial counsel went on further to say, "In looking back in the case the one thing that I wish I would have done that could have been significant would have been pursued that particular lead better." App. 797, ll. 23-25. He testified, "In retrospect, yes, I think it was an important fact." App. 804, ll. 17-18.

Order of Dismissal

The PCR court noted that Petitioner failed to produce the photograph of the alleged shooter, any testimony from Tobbie who obtained the photograph, and, most importantly, any testimony from the actual shooter. The court concluded Petitioner "failed to show that the outcome of his case would have been different if trial counsel had requested a continuance to further investigate" the new lead. App. 823. The PCR court also noted there were three independent witnesses that

identified Petitioner as the shooter thereby eliminating any effect the photograph would have had on Petitioner's trial. App. 823.

The court concluded Petitioner failed to establish any constitutional violations or deprivations that would require the court to grant his application. It therefore denied Petitioner relief and dismissed his application with prejudice. App. 827.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate the identity of the individual in the booking photograph identified by Petitioner and his codefendant as the shooter where Petitioner's identity as the shooter was the main factual dispute in the case.

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 trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Furthermore, the United States Supreme Court has held that "counsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (finding “[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation”) (internal quotation omitted). The United States Supreme Court has also held that “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith, 539 U.S. 510, 527 (2003).

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 was aware that both Petitioner and his co-defendant, Quinton Tobbie, had recently identified the actual shooter in the case, yet trial counsel failed to request a continuance to attempt to further investigate the new lead. Whether Petitioner was the actual shooter was the main factual dispute in the case since evidence put Petitioner at the Shell Station at the time of the shooting. Trial counsel had a duty to investigate further and attempt to locate the individual Petitioner and Tobbie identified as the shooter and question that individual. A reasonable attorney would have requested a continuance to do so.

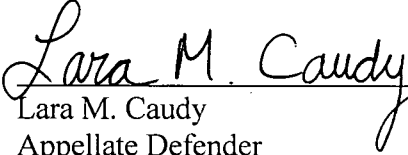
Petitioner was prejudiced because trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel’s failure to investigate the lead regarding the true identity of the shooter allowed the state’s theory of the case that Petitioner was the shooter to go unchallenged. If, after investigation, trial counsel presented evidence at trial that the other individual was the actual shooter, it would have created reasonable doubt in the minds of

the jurors and the jury would have been forced to find Petitioner not guilty. 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 18th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
Edgar W. Dickson, Circuit Court Judge

TRAVIS D. ROBINSON,

PETITIONER,

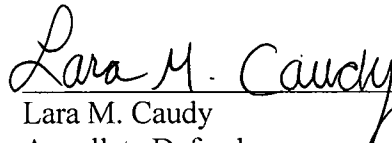
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

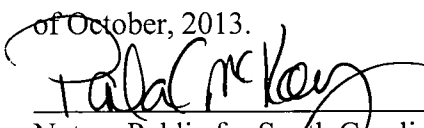
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of October, 2013.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of October, 2013.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.