STATE OF SOUTH CARLOINA
IN THE SUPREME COURT

TAWAN Q. JOHNSON

Petitioner,

Vs

STATE OF SOUTH CAROLINA

Respandent,

APPEAL FROM GREENVILLE COUNTY

G. EDWARD WELMAKER,
CIRCUIT COURT JUDGE

Appelate Case No: 2013-001048

Pro Se Brief,

(Copy)

STATE OF SOUTH CAROLINA
COUNTY OF Greenville

IN THE COURT OF COMMON PLEAS

Ca/No 2013-001048

Tawana Ojlya Johnson
Applicant,

~~SUPPORTING MEMORANDUM OR~~
~~APPLICATION FOR~~ POST-CONVICTION
RELIEF (dismissal)

V.

State of ~~South~~ Carolina Supreme Courts
Respondent,

The above named Applicant, hereby moves this Honorable Court to issue and grant an application for ~~post-conviction~~ Dismissal relief, providing an evidentiary hearing based on the following facts and Statutory case Laws.

STATEMENT OF THE CASE

The Applicant Tawana Ojlya Johnson was indicted by a Greenville County Grand Jury for the offense of Burglary First Degree. A jury trial was held on June 3, 2008. The Honorable Larry Patterson presided, Julie J. Anders Esq. assistant Solicitor represented the State. Daniel J. Farnsworth, Esq. of Greenville, represented the Applicant.

The jury returned a verdict of guilty and Applicant was sentenced to Fifteen (15) years of incarceration in the South Carolina Department of Corrections. Notice of Appeal was timely served and filed, J Falkner Wilkes represented Applicant on appeal. An appeal was perfected and the Appeals Court subsequently issued and Opinion in the matter affirming the conviction and sentence. The Applicant timely moved for a rehearing which was denied, The Applicant further file a petition for Writ of Certiorari that was also denied.

ISSUES

1. Applicant Counsel failed to object to the selection of a predomiantly all "White Jury" in a "Black Defendant's" trial for first degree burglary, A selection of Seven (7) white females, Five (5) white males, and One (1) black female.

2. Applicant Counsel failed to object to the trial Court's burden-shifting Jury instructions with regard to intent element of the burglary charge.

3. Applicant Counsel failed to request a lesser charge of the burglary charge.

4. Applicant Counsel failed subpeona requested defense witness Janice Jackson.

5. Trial Judge erred when failure to Rule on Motion for Direct Verdict.

6. Prosecution Misconduct.

ISSUE I

APPLICANT TRIAL COUNSEL FAIL TO PROVIDE EFFECTIVE ASSISTANCE AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

ARGUMENT I

Under the Sixth Amendment to the United States Constitution and Constitution of South Carolina. A criminal defendant has a right to receive reasonably effective assistance from his attorney. Strickland v. Washington, 466 U.S. 668, 687, 104 S.CT. 2052, 80 L. Ed. 2d 674 (1984). A two-prong test for representation whether a defendant received Constitutionally adequate representation was established by the Supreme Court in Stickland, in which it held that an individual, who asserts an ineffective assistance of Counsel claim, must demonstrate that: (1) His attorney' performance fell below an objective Standard of reasonableness given by all of the circumstances and prevailing professional norms, and (2) a reasonable probability exists that, but for the attorney's unprofessional errors, the result of the proceeding would have been different.

The Applicant received ineffective assistance of Counsel both prior to and during his trial proceeding in violation of his right to effective assistance of Counsel. Applicant contends that due to his Counsel's lackadaisical interest and incompetent representation, Counsel failed to articulate a Sixth and Fourteenth Amendment claim by failure to make any objecting motion to as follow:

Counsel's failure to object to the Selection of a Predomiantely all white Jury in a "Black Defendant's" trial.

In the Applicant's case, Counsel fail to object or file a motion objecting to the Selection of a Predomiantely all "White" jury in a "Black Defendant's" trial of first degree burglary. And it is undoubtly clear, the Applicant being a black individual is a member of a Cognizable Racial group which many years of History has established to be a proving fact and the Prosecution in the Applicant case exercised peremptory challenges to remove the "Black Male", one of the only Two (2) "Blacks" persons of the Defendant's race from the Venire when there were only a panel of twenty (20) Jurors to select from, Eighteen White's and Two (2) Black, a male and female.

In this type of group for selecting a jury in a young "Black" man's trial as the Applicant, there can be no dispute that it permitted "those to discriminate who are of a mind to discriminate.

The panel of pretentual Jurors in the Applicant's case was established in a discriminatory fashion, which Violated his Rights to Equal Protection and Trial by an Impartial and fair Jury under the Sixth, Eight, and Fourteenth Amendment of the United States Constitution.

The Trial Court erred when it allowed a Predomiantely all "White" panel of Jurors for a jury to pick for a jury trial of the Applicant, who is a young "Black Male".

The Prosecutor's use of peremptory challenges against the Applicant and Selection of the predomiantely white jury deprived him of his Rights to a trial by an impartial jury composed of a fair Cross Section of the Community. The Sixth Amendment Protects a defendant by requiring "the presence of a fair Cross Section of the Community on Venires, Panels, or Lists from which petit juries are drawn Taylor v. Louisana, 419 U.S. 523, 526, 95 S. CT. 692, 696 (1975).

In this case it is difficult to hold that Applicant had waived a Right which he did not know existed at the time of his trial.

The Applicant trial Counsel failure to object or file a motion objecting to the Selection of a predomiantely all white jury in his trial ("Black Male") for first degree burglary Constitutes ineffective assistance of Counsel.

ISSUE II

APPLICANT TRIAL COUNSEL FAILURE TO OBJECT TO THE TRIAL COURT'S ERRONEOUS, CONTRADICTIVE AND BURDEN SHIFTING JURY INSTRUCTION WITH REGARD TO INTENT ELEMENT, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL:

ARGUMENT II

In the Applicant case, the trial Court erred in it instruction which allowed the jury to presume and formulate an intent to commit a crime once Applicant had gain entry into the victim's home where there was no evidence presented by the State to establish that there were an intent crimes, trial Counsel's failure to object to trial Court's erroneous and contradicted instruction Constituted ineffective assistance. The trial Court erroneously instruction regarding intent element was an act of burden-shifting. And trial Counsel's failure to object, also Constituted ineffective assistance of Counsel which prejudice Applicant.

Tr. Pg. 89, Ln. 11-25; Pg. 90, Ln. 1-2, (Jury Instructions), the State must also prove that the entry occurred and that at the time of the entry, the defendant had intent to commit a crime, any crime, a felony or a misdemeanor, whether or not that crime was, actually committed.

The mere entry into a dwelling without consent is not sufficient to Constitute first degree burglary. There must have been an intent to commit a crime once inside.

Further, it is not sufficient that intent to commit a crime was formulate after entry. To convict the defendant of first degree burglary, you must find that at the time he entered the dwelling, the defendant intended to commit a crime once therein, here the trial Court's instruction was contradictive and burden-shifting. The defendant actions after he entered the dwelling can be evidence used to determine if he had intent to commit a crime at the time of entry.

Tr. Pg. 91, Ln. 13-16, Jury went into deliberation.

Tr. Pg. 92, Ln. 15-25; Pg. 93, Ln. 1-4; the jury had questions of the trial Court. (1) Jury ask for a transcript of prior testimony, (2) what was the elements of intent.

Tr. Pg. 93, Ln. 10-24; Jury instruction on intent:

Now, in regard to intent, which was your question. there must have been an intent to commit a crime, any crime, a felony, or misdemeanor, whether or not that crime was a actually, committed. the mere entry into a dwelling without consent is not sufficient to Constitute first degree burglary, There must have been an intent to commit a crime once inside.

Further, it is not sufficient that the (intent) to commit a crime was (formulated) after entry. to convict the defendant of first degree burglary, you must find that at the time he entered the dwelling, he intent to commit a crime inside the dwelling. [the defendant's actions, after he entered the dwelling, can be evidence used to determine if he had the intent to commit a crime at the time of entry].

In parts, the trial Courts Jury instruction was improper erroneous, and contradictive burden-shifting instruction which prejudiced the Applicant.

ISSUE III

TRIAL COUNSEL WAS INEFFECTIVE WHEN FAILURE TO REQUEST AN ADDITIONAL CHARGE OF LESSER INCLUDED OFFENSE:

ARGUMENT III

To establish a claim of ineffective assistance of Counsel, Applicant 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 results of the trial would have been different, Strickland v. Washington, 466 U.S. 668, 104 S. CT. 2052, 80 L. Ed. 2d 674 (1984); Gullman v. State, 414 S.E. 2d 780 (S.C. 1992).

Trial Counsel's failure to request a charge on a lesser-included offense of the first degree burglary charge where the Applicant claim he had no intent to commit a crime before or after he gained entry, claims that his actions were to seek a safe haven because his life were being threaten. And Counsel's failure to request a lesser-included charge at trial Constituted inadequate legal representation. The Prejudice of this error, was compounded by the following remarks of the Prosecution in it closing argument.

Tr. Pg. 74, Ln. 14-17 Prosecutor statement; But you can look at all the circumstances before and after that entry is made. Okay, And that's case Law, that State v. Pinkney.

Tr. Pg. 75, Ln. 8-25; There's been a little bit of talk in this case, about what case Law calls voluntary intoxication, and the Judge is also. Voluntary intoxication is not just drinking been or liquor, intoxication, also comes from drug use and when you choose to make yourself intoxicated. You are still responsible for your actions. You're accountable for the things you do. Because nobody made you become intoxicated. That real old case Law from the State v. Vaughn.

And in fact, I think this just really sums it, the effect if drunkenness or drug use on the mind and (mens) actions is a fact known to (everyone).

Tr. Pg. 75, Ln. 25; Pg 76, Ln. 1-2, the trial Court informed (warned) the Prosecutor to only argue evidence thats been introduce in the case; That they (Prosecutor) could not read anything that's not in evidence or anything of that nature.

Subsequently, the Prosector (Ms. Anders) in her above addressed argument to the jurors, gave a very clear indication that she was prosecuting the Applicant because of her personal bias-ness and prejudice toward men as a hold, also it is very possible that the absence of a charge on a lesser-included offense, gave rise to a conclusion by the jury that it was impermissible for them to consider a lesser-included offense of the first degree burglary charge. Applicant's trial Counsel failure to request a charge on a lesser-included offense, cause prejudice and provided him with ineffective assistance. This Court should grant a new trial in this case.

ISSUE IV

APPLICANT TRIAL COUNSEL FAILURE TO INVESTIGATE AND SUBPEONA REQUESTED DEFENSE WITNESS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL:

ARGUMENT IV

To establish claim of ineffective assistance of trial Counsel, Applicant for Post-Conviction Relief (PCR) has burden of proving Counsel's representation fell below objective standard of reasonableness and, but for Counsel's errors. There is reasonable probability that result at trial would have been different; Reasonable probability is probability sufficient to undermine confidence in outcome of trial, Underwood v. State, 309 S.C. 560, 425 S.E. 2d 20 (1992); Strickland v. Washington, 466 U.S. 668, 104 S. CT. 2052, 80 L. Ed. 2d 674 (1984).

The Applicant in this case claim that his trial Counsel failure to

contact, investigate, and subpeona witness Janice Jackson as a witness in his behalf. And this failure prejudice him which Constituted ineffective assistance of Counsel.

The Applicant claims that he informed his Counsel the he had tried to seek refuge in Janice Jackson's home before he managed to gain entry in the victim's home, and that Ms. Jackson could testify to that facts, and that a group of individual was chasing him and that he had also stated those facts at her door (request to be let in because some was trying to kill him), but that she was to afraid to let him in at that hour.

An Applicant is entitled to relief based on ineffective assistance of trial Counsel if he can establish that Counsel's performance was deficient and that this deficiency prejudiced his defense, Strickland v. Washington, 466 U.S. 668, 104 S. CT. (1984); Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985); Pauling v. State, OP. NO. 24811 submitted May 27, 1998--Filed July 13, 1998; Grier v. State, 384 S.E. 2d 722 (S.C. 1989).

In the Applicant's case , his trial Counsel failure to interview subpeona Janice Jackson to his trial as a defense witness in his behalf was deficient performance, deficient performance that prejudiced him and violated him Sixth And Fourteenth Amendment Constitutional Rights to effective assistance of Counsel.

The Applicant should be granted a new trial.

ISSUE V

APPLICANT"S TRIAL COURT ERRED WHEN FAILURE TO RULE ON MOTION FOR A DIRECT VERDICT AND ERRED WHEN FAILURE TO GRANT A DIRECT VERDICT:

ARGUMENT V

The State failed provide any or prove that the Applicant intended to commit a crime before or after entry, it impermissibly relied solely on the Statutory permissive inference.

The State fail to provide any evidence at all to show that Applicant intended to commit a crime within the dwelling, instead it relied exclusively on the permissive inference instruction provide by trial court (the jury could presume).

First degree Burglary is defined in S.C. Code Ann §16-11-311

(A) A person is guilty of burglary in the first degree if the person enters a dwelling within consent (And) with (Intent) to commit a crime in the dwelling (And) either;

(1) When, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime;

(a) is armed with a deadly weapon or explosive; or

(c) uses of threatens the use of a dangerous instrument; or (3) the entering or remaining occurs in the nighttime.

Tr. Pg. 88, Ln. 23-25; Pg. 89, Ln. 1-2

At trial, in addition to defining the aggravating circumstances regarding being armed with a deadly weapon or the threatening use of a deadly weapon.

Tr. Pg. 89, Ln. 11-25; Pg. 93, Ln. 13-24

The trial Court defined the terms with instruction to the jury. the trial Court instructed jury that.

(1) The State must prove that the Applicant had an intent to commit a crime in the dwelling, whether or not that crime was actually committed.

(2) The mere entry into a dwelling without consent is not sufficient to Constitute first degree burglary.

(3) There must have been an intent to commit a crime once inside.

(4) Further, the trial Court, instructed the jury that, it is not sufficient that the intent to commit a crime was formulated after entry. to convict the defendant of first degree burglary, you must find that at the time he entered the dwelling he had intent to commit a crime once therein.

(5)The defendant's actions after he entered the dwelling can be evidence used to determine if he had the intent to commit a crime at the time of entry.

The permissive inference allowed to be taken from the improper instruction in this case is unconstitutional as applied to the Applicants.

Because [a] permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" Standard only if, under the fact of the case, there is no rational way the trier could make the connection permitted by the inference, for only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination.

County Court of Ulster v. Allen, 442 U.S. 140, 99 S. CT. 2213 (1979), for there to be a rational connection "between the basic facts that the Prosecution proved and the ultimate fact presumed, the latter must "more likely than not...flow from" the former, Id at 2228-29. There was no "rational connection "between the States" alleged claim that the Applicant intended to commit a crime because he moved a couple pieces of furniture to the "window and door" for purposes of barricading them, to prevent himself from being injured or perhap being kill by the chasing perpetrators.

The Applicant's actions with the furniture was not his intent before his entry of the dwelling and no act for grounds to be consider as an intent crime.

In this case, it was the Prosecution who bears the burden of establishing guilt, it may not rest it case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."

The State failed to meet its burden in this case because it relied exclusively on the permissive inference to prove that Applicant was guilty of first degree burglary with intent to commit a crime therein.

The trial JUDGE INSTRUCTED THE JURY THAT THEY COULD CONSIDER THE Applicant's actions after he entered dwelling Tr. Pg.89, Ln. 20-25; Pg. 90, Ln.1-2, that it is not sufficient that the intent to commit a crime was formulated after entry. next, trial Judge instruct that the defendant's actions after he entered the dwelling could be evidence used to determine if he had the intent to commit a crime at the time of entry.

The trial Judge's instruction that the jury could consider Applicant's actions once entry of dwelling as evidence of his intent to commit a crime, allowed the Jury to use presumption (inference) as a "fact" in the case. The inference however, was not a "fact" proven by he State in its case against the Applicant. It is not a fact that those who enter a dwelling are automatically intending to commit a crime therein, And guilty of first degree burglary. A "fact" is defined as; (1) a thing done, (2) The quality of being actual; (3)(a) something that has actual existence, (4)(b) an actual occurrence; (5) a piece of information presented as having objective reality. See Merriam-Webster Dictionary (at http: www. merriam-webster. com. last visit July 7, 2009), the instruction amounted to a comment on the facts of the case by the judge and relieved the State of its burden to prove Applicant of having an intent to commit a crime before and after his entry of the victims dwelling.

A defendant is entitled to a direct verdict when the State fails to produce evidence of the offense charged, State v. McKinght, 352 S.C. 635, 642, 576 S.E. 2d 168, 171, Cert. denied, 540 U.S. 819, 124 S. CT. 101, 157 L. Ed. 2d 36 (2003); State v. Rothschild, 351 S.C. 238, 243, 569 S.E. 2d 346 348 (2002).

The Circuit Court should not refuse to grant the direct verdict motion when the evidence fail to prove that the accused is guilty, State v. Mitchell, 341 S.C. 404, 409, 535 S.E. 2d 126. 127 (2000), "Accusation" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof, State v. Lollis, 343 S.C. 589, 541 S.E. 2d 254 (2000). See also State v. Cherry, 361 S.C. 588, 606 S.E. 2d 475 (2004). In this case, the evidence presented by the State did not rise above the 'Level" of mere accusation, and the Applicant should have his conviction reversed. He respectfully asks this Court to do so.

ISSUE VI

THE PROSECUTOR KNOWINGLY ALLOWED FALSE AND PERJURY TESTIMONY CONSTITUTED MISCONDUCT:

ARGUMENT VI

Under-Direct by Prosecutor Ms. Anders, Tr. Pg. 26, Ln. 4-25, the homeowner Nicole Henderson, gave testimony that, she heard a loud knock at her door, she awaken her husband, and while he was trying to get downstairs, she looked out the window and seen a black male figure alone. Pg. 27, Ln. 7-8, she immediately got on the phone and called the police, Pg. 27, Ln. 22, I was on the phone with 911; Tr. Pg. 28, Ln. 17-25, Ms Henderson continue to give testimony. She stated that her husband never went downstairs, that the Applicant never came upstairs, (and then the Prosecutor ask her, what else did you hear, not words, but what did you hear when he (Applican) was inside). Ms. Henderson replied, I could hear clinking we thought it was a gun, but we had a stainless black desk and it was clinking..

Under-Direct by Ms. Anders Tr. Pg. 41, Ln. 3-6, homeowner Charzaray Henderson were asked, what did he hear? Aside from words, what did he hear, his reply was, I mean. I'm standing at the top of the stairs with a stick, you know I heard---it was a clinking noise.
The above testimony from the two homeowners was false and misleeding statement of evidence which the Prosecutor coached them to present to the jury.

In the transcript record it is clear that Ms. Henderson lied under oath. See Tr. Pg. 35, Ln. 11-16, She stated that didn't ever see a "knife", "gun" in the house, didn't see any other weapon that the Applicant had on him, Tr. Pg. 35, Ln. 17-19 stated she didn't see any other weapon that the Applicant had on him, I never seen him, I was up stairs, Tr Pg. 35, Ln. 23 I was still on the phone with 911

Further, still Under-Cross tr. Pg. 36, Ln. 10-23 Ms. contradicted her prior testimony, she stated that the Applicant did not come upstairs, that he remained downstairs he whole time and that she did see Applicant lay down, I seen a figure laying at the bottom. When he kicked the door in, he fell straight in, he laid on his back. Ms Henderson was ask, did the Applicant continue to lay there, she stated, well, no. Because, like I said, he had to get up. Because he had to walk a good ways to go to the computer.

In this case,the prosecution rehearsed the testimony with the homeowner Ms. Henderson and led her on to testify falsely to the trial Court and commit perjury when all along that Nicole Henderson had originally opened the "Door" to her "Home" with the safety chain attached to the "Door" and talked to the Applicant but, then decided not to let the Applicant in. But at that point, the Applicant was in such a state of panick out of fear for his life and no control of his action for seeking a safe haven, he barged through the "Door" with no intention other than, to get away from the source of danger that was threaten his life.

The Homeowners was led to give perjury testimony. Nicole Henderson Committed perjury, the Prosecution led her on to commit this in-justice act and condoned to the giving of false evidence of testimony to the trial Court.

The record is very clear, Ms. Henderson lied under oath and the Prosecution coached and allowed her to do so. Ms. Henderson at one point said, she seen the Applicant fall trough the "Door", seen him laying on the floor at the bottom of the stairs; Then more than once, say, she didn't see this or that because she was upstairs on the phone talking to "911". Ms. Anders the Prosecutor in this case, action of coaching and allowing the false testimony Ms. Henderson's, Constituted an act of misconduct and prejudiced the Applicant.

The Applicant should be granted a new trial.

CONCLUSION

The record in this case failed to establish that the Applicant entered the homeowners house in question with any intent to commit any crime therein. The evidence shows that thee Applicant was knocking on the "Door" of the house in an attempt to flee from people that he was convinced were after him, Tr. Pg. 26-28, the Applicant was heard say that "there were somebody trying to kill me, somebody is tying to kill me, Tr. Pg. 40, Ln. 14-18 when the homeowner first seen the Applicant, the Applicant said; "man, are you trying to kill me, too? Tr. Pg. 40, Ln. 19-21 at that time, the Applicant jumped up off the floor from where he had fallen through the "Door" and ran and hid behind the side of the steps. The record is clear that the Applicant was "Hallucinating" and was "just saying stuff".

The homeowner also testified that the Applicant was "on something" and wasn't making sense, that he believed Applicant was "highly intoxicated" on some kind of drug. Tr. Pg. 46, Ln. 19-24 Mr. Henderson at one point testified that he could hear that Applicant seem to be talking to somebody else, something about, you're trying to kill me at the "back door" or something to that effect.

Applicant never went upstairs and no one was hurt, Tr. Pg. 28, 46-47 although the police found a knife outside two "Doors" from the residence, the homeowners never saw any weapon, there was no evidence that the Applicant intended to commit any crime when he barged into the house and the Applicant actually did not commit any crime, to the contrary there was no evidence presented to Constitute a first degree burglary charge against Applicant.

The Applicant pray that this Honorable Court will provide Justice where it is due by granting an application for ~~post-conviction~~ Dismissal relief for an evidentiary hearing in these cited matters.

RESPECTFULLY SUBMITTED,

Tawana O. Johnson #220256
T.R. (C.I.) Lower, U-~~3A-203~~ 2B 224
200 Prison Road
Enoree, S.C. 29335

Date: _____ 2013