

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

RECEIVED

William P. Keesley, Circuit Court Judge NOV 19 2013

S.C. Supreme Court

ERNEST BATTLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001776

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

- I. Whether defense counsel was ineffective in failing to object to a mere presence charge that was not a complete statement of the law?
- II. Whether defense counsel was ineffective in failing to move for a mistrial when the solicitor gave a closing argument that was designed to arouse the jurors' passions or prejudices over drugs in society?

STATEMENT

Petitioner was convicted of trafficking in cocaine and for possession with intent to distribute cocaine within proximity of a school on June 4, 2001, after a jury trial held before the Honorable Thomas L. Hughston, Jr., in Charleston County. Respective sentences of twenty-five (25) years and ten (10) years were imposed. William McGuire, Esquire, and Leslie Sarji, Esquire, represented petitioner. Mike Bosnak, Esquire, Mark Bourdan, Esquire, and John Crout, Esquire, were the assistant solicitors. (App. p. 1 – p. 515).

Petitioner appealed his convictions and the appeal was dismissed by the Court of Appeals on May 20, 2003, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Battle, Op.No. 2003-UP-348. (App. p. 517 – p. 531). Petitioner filed an application for post-conviction relief on September 10, 2004. (App. p. 532 – p. 577). Respondent filed a return dated May 25, 2005. (App. p. 578 – p. 583). An evidentiary hearing was held on May 30, 2006, before the Honorable William P. Keesley. Petitioner was present and was represented by Rad S. Deaton, Esquire. Respondent was represented by Colleen E. Dixon, Assistant Attorney General. Petitioner testified in his own behalf and called Lana Nelson, Joshua Robinson, Felicia Smalls, James Condon, Jason Wallace, and Rodney Davis to testify. William S. McGuire testified in respondent's behalf. (App. p. 585 – p. 752). On July 5, 2006, Judge Keesley issued an order granting relief on one issue, but ruling against him on the other issues that were presented. (App. p. 753 – p. 771). Respondent appealed the grant of post-conviction relief and the South Carolina Supreme Court reversed the PCR court on April 13, 2009. (App. p. 798 – p. 826).

On October 12, 2010, petitioner filed a second application for post-conviction relief alleging his first PCR counsel was ineffective for not cross appealing on the remaining issues. (App. p. 827 – p. 843). Respondent filed a return and motion to dismiss dated May 9, 2011. The Honorable

Kristi L. Harrington issued a conditional order of dismissal dated August 16, 2011. (App. p. 850 – p. 855). Petitioner filed an objection and response dated September 19, 2011. (App. p. 856 – p. 863). On April 4, 2012, Judge Harrington issued a final order denying and dismissing petitioner’s application for post-conviction relief. (App. p. 864 – p. 866). Petitioner appealed and filed a petition for writ of certiorari on October 15, 2012. (App. p. 867 – p. 875). On March 15, 2013, the South Carolina Supreme Court remanded petitioner’s case for an evidentiary hearing on petitioner’s current application for post-conviction relief. (App. p. 877 – p. 878). On July 22, 2013, the Honorable Deadra L. Jefferson issued a consent order granting a belated appeal on the issues that were not cross appealed pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (App. p. 879 – p. 882).

This petition follows.

ARGUMENT I

Defense counsel was ineffective in failing to object to a mere presence charge that was not a complete statement of the law.

Petitioner was accused of trafficking in excess of 28 grams of cocaine in North Charleston on July 15, 1999, while at 1855-B Reddin Road. (App. p. 476). LaShawn Floyd was the State's key witness. She was 19 years old and was petitioner's cousin. She testified that she was involved in arranging a sale of drugs from petitioner to Matt Wallace. She was acting as a go-between. Matt arrived in a cab driven by an undercover police officer. She also saw appellant's car pull up. Petitioner signaled her and she told him that Matt would be alright. None of the police or undercover people saw a drug transaction. LaShawn went back to the apartment and she found the drugs on the ground. The police said they saw her throw the drugs down. She said she got the drugs from petitioner. She also said James Nelson was with petitioner. (App. p. 253, line 1 – p. 267, line 21).

Petitioner's defense was mere presence. It was James Nelson who gave the drugs to LaShawn to sell to Matt Wallace. Petitioner was just giving Nelson a ride. When it came time to charge the jury, the trial court gave the instruction on mere presence:

Mere presence at the scene is not sufficient to establish guilt as an aider or an abettor. All persons who are present aiding, abetting, encouraging, or inciting another to commit a criminal act are equally guilty with the one who does the act.

Aiding and abetting encompasses all assistance rendered by acts or words of encouragement, incitement, or support which preconcert with the intention of rendering assistance if necessary.

All persons present aiding and abetting a felony are regarded as principals and equally guilty. The actual perpetrator is regarded as the agent or instrument by which the crime is perpetrated, not as the chief criminal or more guilty – not as the chief criminal or more guilty than his associates. When two or more persons aid, encourage, and abet each other in the commission of a crime, all being present, all are principals. One present aiding and abetting the commission of a felony is not an accessory but is a principal in the crime committed.

However, if you find from all the evidence that Mr. Battle was merely present at or near the scene of a crime, you are instructed with such presence at or near the scene of a crime would not support a finding of guilty. Mere presence can only create a suspicion, and you cannot find Mr. Battle guilty because of suspicion.

Mere presence at or near the scene of a crime does not in and of itself permit an inference to be drawn by you that he has knowledge of any criminal plan which might have been formed, nor does mere presence support an inference of intent to engage in or to aid criminal conduct. Suspicious circumstances, like mere presence, are not sufficient for a finding of guilt against Mr. Battle. So, of course, mere presence, as I said, is not enough to convict someone of a crime.

(App. p. 432 – p. 432A).

Defense counsel did not object to the above charge on mere presence or ask for a more complete statement of the law on mere presence. In State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct.App. 1995), the court wrote:

The purpose of a mere presence charge in a drug case is to inform the jury that any inference which is permissibly drawn from the presence of the defendant at the location where drugs are found is, as a matter of law, insufficient by itself to convict a defendant of the possession or possession with the intent to distribute drugs. In other words, the law does not allow a jury to conclude guilt beyond a reasonable doubt based solely upon the inferences drawn from presence in the proximity of drugs. It is possible for the jury to infer knowledge of the drugs and the intent to exercise dominion and control over them from the mere presence. The law does not condemn this inference. However, the law will not allow that inference, without more, to prove possession beyond a reasonable doubt.

318 S.C. at 38, 455 S.E.2d at 706.

The trial court fully explained the law on aiding and abetting so the jury could convict petitioner, but failed to fully explain the law of mere presence in a drug case so a jury could acquit petitioner. Defense counsel was ineffective in failing to object to the mere presence charge that was given.

ARGUMENT II

Defense counsel was ineffective in failing to move for a mistrial when the solicitor gave a closing argument that was designed to arouse the jurors' passions or prejudices over drugs in society.

The following transpired near the end of the solicitor's closing argument:

We've got to do something about this, especially in this quantity. That's what makes this case so, so important. It's a 1999 case. It was old. I inherited it when I came to work. I had to do something with it. It's too much drugs involved. I couldn't plead it. I couldn't let it go, because we really in society have to be concerned about people that sell this much drugs.

When you look at the evidence ---

MR. MCGUIRE: Your Honor, I would object in that I ask you to admonish the prosecutor for using that kind of argument. That's against the rules.

THE COURT: I agree with you. It's not a matter of battling drugs. It's a matter of this case.

MR. BOSNAK: I'm sorry.

THE COURT: Go ahead.

MR. BOSNAK: I'm sorry. I apologize.

(App. p. 405, line 21 – p. 406, line 11).

While defense counsel did object to this line of argument, he did not move for a mistrial after the inflammatory argument was made to the jury. In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct.App. 1999), a solicitor made the following closing argument to a jury:

Ladies and gentlemen, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and *ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?*

(Emphasis added by the appellate court). On appeal, the court held that the trial court abused its discretion by denying the defendant's request for a mistrial. The court explained:

In our view, the argument was calculated to appeal to the jury's passions and prejudices by playing on the jury's fear of the impact of drugs on our society. The argument invited the jury to convict the Defendants, even if the evidence did not prove their guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs.

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The

amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

The court also noted in that case that while the evidence against the defendant was very strong, the defense was not wholly implausible, and the prosecutor's improper argument prevented the jury from fairly considering and evaluating that defense. In petitioner's case, the evidence against him was not very strong as it was just the co-defendant's word that she got the drugs from petitioner. This made the solicitor's closing argument even more damaging to petitioner.

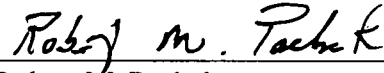
In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

In this case, defense counsel admitted he objected to the solicitor's argument and that he thought it was wrong, but he could not explain why he did not ask for a mistrial. (App. p. 715, line 3 – p. 716, line 14). He certainly had nothing to lose by asking for a mistrial. On the basis of State v. Liberte, he could have gotten petitioner's conviction reversed on appeal. His failure to ask for a mistrial constituted ineffective assistance of counsel.

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

ERNEST BATTLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001776

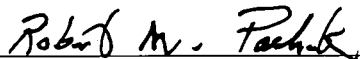
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ernest Battle states:

1. He is an 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 na. 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 Ernest Battle.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of November, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

William P. Keesley, Circuit Court Judge

ERNEST BATTLE,

PETITIONER,

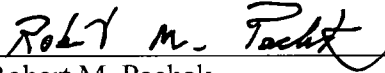
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

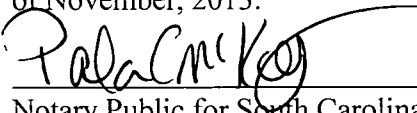
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ernest Battle, #165247, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 19th day of November, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of November, 2013.



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