

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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DEC - 9 2013

Certiorari to Charleston County

S.C. Supreme Court

R. Markley Dennis, Jr., Circuit Court Judge

ANTONIO MOULTRIE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000632

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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Trial counsel was ineffective in not fully investigating shoe print evidence and requiring the State to produce the decedent's shoes prior to trial to establish that a footprint in close proximity to a knife recovered at the scene was the footprint of the decedent, supporting petitioner's claim that the decedent was in possession of the recovered knife and petitioner, with a second knife, stabbed the decedent in self defense.....4

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ISSUE PRESENTED

Was trial counsel ineffective for not fully investigating shoe print evidence and requiring the State to produce the decedent's shoes prior to trial to establish that a footprint in close proximity to a knife recovered at the scene was the footprint of the decedent, supporting petitioner's claim that the decedent was in possession of the recovered knife and petitioner, with a second knife, stabbed the decedent in self defense?

STATEMENT

In May of 2008 the Charleston County Grand Jury indicted Moultrie for murder, indictment #2008-GS-10-4135. On December 1, 2008, Moultrie proceeded to jury trial before the Honorable G. Edward Welmaker. Attorney Martha Runey served as lead counsel and attorney Beattie Butler served as second chair representing Moultrie at trial. Attorneys Henry Leventis and Peter McCoy prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Welmaker sentenced Moultrie to forty five (45) years. A timely notice of intent to appeal was filed and the appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Moultrie, Op. No. 2011-UP-543 (S.C. Ct.App. filed December 5, 2011).

On December 21, 2011, Moultrie filed an application for post conviction relief. The State filed a return on June 20, 2012. On January 22, 2013, an evidentiary hearing was held before the Honorable R. Markley Dennis. Attorney Leslie Ann Sasser represented Moultrie at the evidentiary hearing. Attorney Ashleigh R. Wilson was present on behalf of the State. In a written order signed March 8, 2013, Judge Dennis denied relief and dismissed the application. On March 26, 2013, a timely notice of intent to appeal was served. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective in not fully investigating shoe print evidence and requiring the State to produce the decedent's shoes prior to trial to establish that a footprint in close proximity to a knife recovered at the scene was the footprint of the decedent, supporting petitioner's claim that the decedent was in possession of the recovered knife and petitioner, with a second knife, stabbed the decedent in self defense.

The jury found petitioner guilty in the stabbing death of Daniel Jones. At trial petitioner testified that he stabbed Jones in self-defense after Jones came at him with a box cutter in his left hand and a knife in his right hand. (App. p. 262, line 6 – p. 263, lines 1-18). Petitioner fled the scene in his cab, parked the cab behind a neighbor's house and fled on foot dropping the knife as he jumped over a fence. (App. pp. 263-266). When the police arrived at the scene they found a bloody knife on the tire of a truck as well as shoeprints. (App. pp. 93-100). The blood on the knife was tested and matched the decedent Jones. (App. p. 220). The box cutter was not recovered.

In closing the State argued that the knife and a shoeprint found at the scene both belonged to the petitioner. (App. pp. 331-332). In contrast, petitioner argued in closing that the recovered knife and shoeprint belonged to the decedent. (App. pp. 318-319). At trial the State was precluded from introducing expert testimony in regard to the shoeprint. (App. pp. 185-192). The defense did not offer expert testimony in regard to the shoeprint.

At the start of the PCR hearing petitioner moved for a continuance in order to retain the services of an expert in shoeprint impressions. (App. p. 429, line 20 – p. 430, lines 1-21). The State objected and the PCR judge denied the continuance motion. (App. p. 430, lines 22-23).

Trial counsel Martha Kent Runey testified that she attended the preliminary hearing held in petitioner's case and Detective Watson testified that the footprint found at the scene did not match petitioner. (App. p. 459, lines 9-17). Counsel admitted that she did not further investigate the shoe print evidence. (App. p. 459, lines 18-20). Counsel testified that the shoeprint evidence should

have been investigated, with the help of an expert, to establish that the knife and shoeprint found at the scene belonged to the decedent rather than petitioner. (App. p. 459, line 22 – p. 460, lines 1-18). Counsel testified that prior to trial the State told her that they would not be introducing shoeprint evidence at trial. (App. p. 461, lines 12-25). During trial, however, the State introduced photos of the shoeprint impressions, attempted to introduce expert testimony in regard to the shoe print evidence and in closing argued that the shoe print belonged to petitioner. The State admitted at trial that they informed counsel that they did not intend to use the shoe print evidence at trial but later changed their mind and did not inform counsel. ((App. p. 188, lines 3-16). As noted above, the trial judge precluded the State from introducing expert testimony in regard to the shoeprint evidence.

Trial counsel Beattie Butler testified that he and co-counsel should have looked at the shoe print evidence more carefully and should have required the State to produce the decedent's shoes for comparison. (App. p. 441, lines 8-21). Butler testified that they were mistaken in not investigating the shoeprint evidence. (App. p. 442, lines 22-24). Butler testified that after trial they attempted to obtain the decedent's shoes but were unsuccessful. (App. p. 443, lines 21-25).

In the order of dismissal the PCR judge wrote, "This Court find counsel was not ineffective for failing to investigate the possibility that the victim's shoes matched the footprint impression taken at the scene. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006)." (App. p. 499). The PCR judge erred. Counsel was ineffective in failing to investigate the shoeprint evidence prior to trial and require the State to produce the decedent's shoes for comparison. Petitioner was prejudiced by counsel's error because he was unable to challenge the State's argument that the shoeprint belonged to the petitioner. While counsel should have investigated the shoeprint evidence regardless of any

representation by the State that they did not intend to introduce the evidence, the State clearly benefited from the failure to disclose as the State did not have to produce the decedent's shoe for comparison and the shoes are no longer available for comparison. The identity of the shoeprint was critical to establish petitioner's self defense claim and the combination of trial counsel error and the State's failure to disclose warrant a new trial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

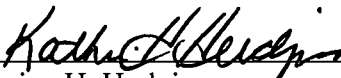
Counsel was ineffective in failing to fully investigate the shoeprint evidence and requiring the State to produce the decedent's shoes prior to trial to establish that the footprint found in close proximity to the knife matched the decedent's shoes supporting the petitioner's claim that the decedent pulled the recovered knife on petitioner first and petitioner, with a second

knife, stabbed the decedent in self defense. Petitioner was precluded from testing the decedent's shoes based on a combination of trial counsel error and the State's failure to disclose information in regard to the shoeprint evidence. Under the narrow facts of this case, prejudice should be presumed and a new trial granted.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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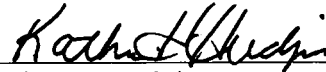
STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

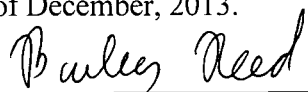
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire this 5th day of December, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of December, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021.