 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County,
J. Mark Hayes, II, Circuit Court Judge

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FEB - 7 2014

S.C. Supreme Court

ROBERT LEE HEYDMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001861

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the lower court err in denying Petitioner relief from his conviction and sentence where evidence showed trial counsel, an attorney with the Seventh Circuit Public Defender Office, had a conflict of interest in representing Petitioner since his office also represented John Fowler, an inmate at the Spartanburg County Detention Center, who testified at Petitioner's trial that Petitioner allegedly confessed to Fowler that he murdered the decedent, where the same public defender office was negotiating with the solicitor for a plea bargain for Fowler in exchange for his testimony against Petitioner?

STATEMENT

A Spartanburg County Grand Jury indicted Petitioner at the August 27, 2007 term of General Sessions for murder. App. 497-498. Petitioner's case was called to trial on September 24, 2008 before the Honorable Paul M. Burch, and a jury. Assistant solicitors Barry Barnette and Jennifer Jordan represented the state, and William McPherson represented Petitioner. App. 1. On September 26, 2008, the jury found Petitioner guilty. App. 402, ll. 7-13. He was sentenced by Judge Burch to life imprisonment. App. 410, ll. 4-21.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Heydman, Op. No. 2011-UP-269 (S.C. Ct. App. Filed June 8, 2011).

On July 8, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 415-422. In his application, Petitioner specifically raised the issue argued in this petition. App. 418. The state filed a return to this application dated May 7, 2012. App. 423-429. A telephonic deposition of William McPherson, Petitioner's trial counsel, was conducted on March 18, 2013. App. 430-463. Assistant Attorney General Suzanne H. White represented the state, and F. Milton Mann, Jr. represented Petitioner at this deposition. App. 431.

The matter proceeded to an evidentiary hearing on April 4, 2013 before the Honorable J. Mark Hayes, II. App. 464. Assistant Attorney General Suzanne H. White represented the state, and F. Milton Mann, Jr. represented Petitioner. App. 611. The deposition of William McPherson was admitted into evidence by Judge Hayes at this hearing. App. 482, l. 11 – 483, l. 6. By order dated July 24, 2013, Judge Hayes denied Petitioner relief. App. 490-496.

This petition for writ of certiorari follows.

ARGUMENT

The lower court erred in denying Petitioner relief from his conviction and sentence where evidence showed trial counsel, an attorney with the Seventh Circuit Public Defender Office, had a conflict of interest in representing Petitioner since his office also represented John Fowler, an inmate at the Spartanburg County Detention Center, who testified at Petitioner's trial that Petitioner allegedly confessed to Fowler that he murdered the decedent, where the same public defender office was negotiating with the solicitor for a plea bargain for Fowler in exchange for his testimony against Petitioner.

Evidence at Trial

At approximately 8:05 am on the morning of December 13, 2006, Angela Dawn Fowler ("Dawn") called 911 to report a burglary after she allegedly arrived home after taking her daughters to school and noticed the carport door leading into the residence propped open. App. 80, l. 14 – 81, l. 8. Investigator Jason Bryant of the Spartanburg County Sheriff's Office testified that there were no signs of forced entry and "nothing appeared to be disturbed or in disarray" inside the home. He also said there were electronics, jewelry, and cash inside the house. In the back bedroom, the decedent, Richard Fowler, was found "lying on the bed on his back with a silver knife on his chest, battered unrecognizable." There was blood all over the walls and ceiling. App. 85, l. 1 – 89, l. 12.

The decedent was Dawn's ex-husband and the father of her three daughters. Despite divorcing years earlier, the couple had since reconciled and lived together with their children. App. 137, ll. 4-8; App. 159, l. 21 – 160, l. 2. The decedent was disabled due to an injury to his back that occurred years earlier while he was working. App. 138, ll. 6-20. The testimony indicated that in September 2006, he received a ninety thousand dollar settlement from a workman's compensation claim. App. 138, l. 21 – 139, l. 3; App. 245, l. 23 – 248, l. 5. The decedent kept this money in a

safety deposit box at a local bank in the form of cashier's checks and denied Dawn access to any of the money. App. 139, ll. 4-19; App. 249, l. 2 – 251, l. 10.

Investigator Bryant testified that it was obvious from the beginning that Dawn was lying about the alleged burglary. Dawn maintained her story about the burglary until she went to the sheriff's office for questioning and was confronted with conflicting evidence. She then confessed to law enforcement that she stabbed and killed the decedent. After this confession, Dawn changed her story again and alleged that Petitioner killed the decedent. Dawn ultimately pled guilty to conspiracy to commit murder, conspiracy to kidnap, and accessory after the fact of murder. In exchange for her testimony implicating Petitioner in the crime, Dawn received a generous plea offer and was sentenced to only thirteen years.

Dawn testified that she met Petitioner in March or April 2006 at church and that the two "became real good friends." Petitioner also became friends with the decedent and often did work for the couple around their house. App. 139, l. 20 – 141, l. 14. A couple of days before the murder, Petitioner had come over to the house to help "haul stuff off" from the yard.

Dawn claimed she told Petitioner "[h]ow abusive [the decedent] was and how he was with the kids and just how bad we lived in our situation at home." She said it was "[m]ainly verbal abuse. But Richard had pulled a knife on [her] before." She claimed that Petitioner told her "he could take care of the problem if it didn't get better at home with Richard." Dawn alleged she and Petitioner talked about the "situation" on December 12, 2006, the day before the murder, and that Petitioner said "to leave the door unlocked and he would come take care of Richard when [she] took the kids to school" the next day. Dawn testified that Petitioner allegedly called her on the morning of the murder and left her a voicemail reminding her to leave the carport door open and "that if he took care of it he would leave the back carport door propped open." App. 141, l. 15 – 143, l. 9.

After dropping her daughters off at school, Dawn claimed she went home, noticed the carport door propped open, and called 911. She initially reported a burglary. She later told police that the decedent “tried to stab [her] first” and then she stabbed him. Dawn claimed she told the police this because she “was scared and trying to cover up for [Petitioner].” App. 147, l. 2 – 149, l. 17.

Dawn confessed that for years she had been trying to find someone to kill her husband. She testified that she talked to her friend Shawn Porter along with many others about trying to find someone to do “something about Richard.” App. 149, l. 20 – 150, l. 8. Porter later confirmed this fact. He testified that Dawn had asked him “maybe twice” “if [he] knew anybody to get rid of [the decedent].” App. 308, ll. 4-15.

Petitioner testified that he met Dawn and the decedent in September 2006 at church and that Dawn was “like a sister” and the decedent was “like a brother.” Petitioner would help the decedent out around the house “whenever he needed some help.” Petitioner testified that on December 11, 2006, he went over to the Fowler’s residence “to clean up some stuff out of the yard and stuff like that.” He and the decedent talked that day about Petitioner building handicapped ramps around the residence and “maybe a little deck on the back.” The decedent had also asked Petitioner to return “one day that week and move some furniture out cause he was gonna buy them a new bedroom [set].”

Petitioner testified that on the morning of December 13, 2006, he spoke with the decedent on the phone and agreed to come over that morning to help move the furniture. Petitioner also wanted to discuss the construction of the handicap ramps and brought over an invoice for the decedent to approve. When he arrived at the residence, Petitioner said the side door of the house was propped open like somebody had “started to move stuff around in the house.” He went to the

door and knocked, but there was no response. He testified that he heard “loud noises back towards the back like . . . somebody [was] moving something.” So he went into the house and walked “towards the back bedroom where the furniture was supposed to be moved.” Petitioner said that when he walked into the bedroom he “observed Mrs. Fowler standing over Mr. Fowler with a stick beating him in the head.” He “grabbed the stick from her and left the scene and told her to call 911.” App. 331, l. 1 – 333, l. 12.

After leaving the house, Petitioner testified that he drove to a landfill and threw the stick in the landfill. He said that he “was in shock and didn’t realize what [he] was doing at the time that this incident happened.” While acknowledging that destroying the evidence was wrong, Petitioner denied both killing the decedent and assisting Dawn in killing the decedent. Petitioner testified that he did not know a knife had been used in the murder until he heard it at his bond hearing. App. 334, ll. 1-25.

John Fowler Testimony

John Fowler, who was an inmate at the Spartanburg County Detention Center during the months leading up to Petitioner’s trial, testified that he met Petitioner in jail and that the two had various conversations in the recreational yard about why Petitioner was in jail. Fowler testified:

He said he was having an affair with a woman named Dawn Fowler. She had a husband named Richard Fowler and he met them at the Una First Baptist Church. He said that, during the course of their affair, she asked him to kill her husband and she was gonna pay with \$90,000 she was suppose to receive in Probate Court.

He came over to the house one day. He got a call that morning. He came over to the house. He said it was a call from Richard asking him to come do an estimate on a wheelchair ramp. He came over in a ’99 green, forest green van. He came through the back-door, which was left open for him. And he heard a noise. He came in the back and Richard was laid on the bed, Dawn was stabbing him, and he took an ax handle and hit him upside the head and the chest, which is what killed him, and then he told Dawn to call the police and act like she just came home and say it was a

burglary, and he left and threw the ax handle in the garbage dumpster.

App. 266, ll. 1-18.

Fowler further testified that Petitioner told him the money was in a safety deposit box and that only the decedent had access to it. App. 266, ll. 19-24.

Fowler admitted that he had several pending charges including two armed robberies, an attempted car breaking, and inciting prisoners to riot. Fowler was also charged with violating his probation. App. 267, ll. 17-23. In addition to these pending charges, Fowler was impeached with several prior convictions including grand larceny, two counts of distribution of cocaine, and financial transaction card fraud. App. 269, l. 8 – 271, l. 9. In response to defense counsel's questioning, Fowler stated it "would be nice" if the solicitor reduced his charges in exchange for his testimony and that he was hoping that would happen. App. 274, l. 21 – 275, l. 2. Defense counsel pointed out that Fowler's charge of inciting prisoners to riot had already been dismissed on June 9, 2008 due to "prosecutorial discretion" suggesting that the solicitor had dismissed that charge in order to entice Fowler to testify against Petitioner. App. 272, l. 20 – 274, l. 20.

Evidence at PCR

William McPherson, Petitioner's trial counsel, testified that he worked for the public defender office in Spartanburg and was appointed to represent Petitioner. App. 436, ll. 11-23. Trial counsel acknowledged that another attorney in his office represented John Fowler, who testified against Petitioner at trial and said that Petitioner "admitted to committing the act against the victim in this case." Trial counsel thought that Fowler's testimony was hurtful to Petitioner's defense.

Trial counsel testified that he did not become aware of this conflict until "late in the game" and did not know of any agreement with Fowler until "it was almost time to go to trial." He does not recall whether he ever discussed the conflict with Petitioner. He claimed that he did not receive

any information from inside his office that these negotiations were going on, but acknowledged that both Petitioner's and Fowler's files were stored in the same location.

Trial counsel conceded that his representation of Petitioner and his office's representation of Fowler was a direct conflict and that it was a mistake not to bring it to Judge Burch's attention. Trial counsel testified that he now thinks a motion for a mistrial should have been made. App. 440, l. 1 – 447, l. 19.

Petitioner testified that trial counsel worked for the public defender office and was court appointed to represent him. He explained that he met John Fowler at the Spartanburg County Detention Center while he was waiting for trial and that the two had several conversations. Petitioner said that Fowler testified at trial that Petitioner had confessed to Fowler that he murdered the decedent, but that this testimony was not true.

Petitioner testified that while the jury was deliberating, trial counsel spoke to him in the holding facility and explained the conflict of interest regarding his representation of Petitioner and his office's representation of Fowler. Trial counsel never told Petitioner when he first became aware of the conflict. Petitioner testified that trial counsel was concerned about the conflict, but told him "instead of bringing it up to the judge attention that I could use it for a PCR." Petitioner explained that the conflict did not come out during Fowler's testimony, but it was inferred from his testimony that his attorney worked out a deal for him in exchange for his testimony against Petitioner. App. 471, l. 11 – 476, l. 23.

Order of Dismissal

The PCR court noted, "Even though the public defender's office represented both [Petitioner] and Fowler, the representation did not arise out of the same facts or circumstances." The court found that Petitioner's representation by trial counsel and Fowler's representation by the

public defender office did “not create an automatic disqualifying event for Counsel” and that the “mere possibility of a conflict of interest is insufficient to challenge a criminal conviction.” The court went on further to say that Petitioner failed to establish that trial counsel’s performance was adversely affected by his office’s representation of Fowler.

The court therefore concluded that Petitioner did not meet his burden of proving ineffective assistance of counsel and dismissed his application. App. 494-496.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. Mickens v. Taylor, 535 U.S. 162, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Petitioner must show that trial counsel had an actual conflict of interest that adversely affected his performance in representing him. Cuyler, 446 U.S. at 348; Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 691 (2007); Fuller v. State, 347 S.C. 630, 633, 557 S.E.2d 664, 665 (2001); Thomas v. State, 346 S.C. 140, 142, 551 S.E.2d 254, 255 (2001); Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998); Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984). Where an actual conflict of interest existed, Petitioner need not show prejudice resulting from that conflict. Cuyler, 446 U.S. at 348-350; Duncan, 281 S.C. at 438, 315 S.E.2d at 811. To demonstrate an actual conflict of interest, Petitioner must show that trial counsel owed a duty to a party whose interests were adverse to Petitioner’s interests. Staggs, 372 S.C. at 551, 643 S.E.2d at 692; Fuller, 347 S.C. at 633-634, 557 S.E.2d at 665; Thomas, 346 S.C. at 143-144, 551 S.E.2d at 256; Jackson, 329 S.C. at 354-355, 495 S.E.2d at 773; Duncan 281 S.C. at 438, 315 S.E.2d at 811.

In this case, trial counsel had an actual conflict of interest due to his representation of Petitioner and his office’s representation of Fowler, who testified against Petitioner at trial. Trial

counsel and his office had a duty to Petitioner to diligently defend his murder charge, while at the same time, had a duty to diligently represent Fowler on his various pending charges and work vigorously to get him the best plea offer possible. Getting the best plea offer possible for Fowler involved him testifying against Petitioner, another public defender client. A public defender office should not be permitted to represent defendants with such conflicting interests.

As soon as trial counsel learned of the conflict of interest, he should have, at a minimum, brought it to the attention of the trial judge, and moved for a mistrial. Trial counsel conceded this during his deposition stating that it was a mistake not to bring it to the trial judge's attention and move for a mistrial. He also acknowledged that it was a direct conflict of interest for him and his office to represent both Petitioner and Fowler. See App. 443, l. 16 – 445, l. 17.

Petitioner and Fowler obviously had adverse interests. Fowler testified against Petitioner claiming that Petitioner confessed to murdering the decedent in order to receive a favorable plea offer from the state. Fowler's damaging testimony was used to convict Petitioner of murder and also conflicted with Petitioner's own testimony at trial.

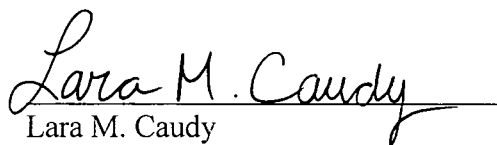
Because an actual conflict of interest existed, Petitioner does not need to prove prejudice from trial counsel's representation. See Cuyler, 446 U.S. at 348-350; Duncan, 281 S.C. at 438, 315 S.E.2d at 811.

Due to trial counsel's conflict of interest, Petitioner's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

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 7th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

ROBERT LEE HEYDMAN,

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V.

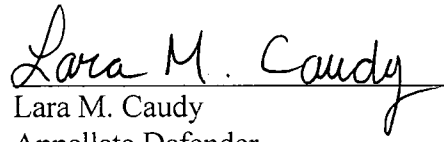
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RESPONDENT

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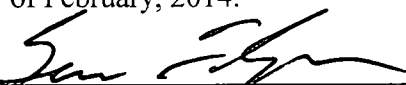
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Robert Lee Heydman #330872, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of February, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.