ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

R. Lawton McIntosh, Circuit Court Judge

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APR 21 2014

S.C. Supreme Court

JEFF A. WEBB ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001694

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

I. The PCR judge erred in finding no ineffectiveness in trial counsel's failure to object to the trial judge's accomplice liability jury charge and the solicitor's accomplice liability closing argument where both offered the jury an impermissible alternate theory of liability that was unavailable in the case because the offenses charged against the petitioner differed from the offenses charged against the "co-defendant," which was recognized by the PCR judge's acknowledgement that this was a **novel issue regarding an interpretation of "accomplice liability predicated upon actual charges brought by the state and not on the underlying facts presented at trial."**

II. Trial counsel erred in failing to object to the solicitor's closing remark that highlighted petitioner's failure to testify at trial because this deprived petitioner of the right to a fair trial.

STATEMENT

Petitioner Jeff A. Webb was convicted of two counts of armed robbery and two counts of possession of a weapon during the commission of a violent crime per jury trial held during the March 2010 term of the Oconee County General Sessions Court before Judge Alexander S. MaCauley.[1] Petitioner was sentenced to an aggregate prison term of twenty years. App 1-272. R. Daniel Day represented petitioner at trial, and Assistant Solicitor David Wagner appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Webb, Opinion Number 2011-UP-566 (S.C. Ct. App. December 20, 2011). Robert Michael Pachak represented petitioner on direct appeal. App. 282-283.

On July 12, 2012, petitioner filed a PCR application with the Oconee County Office of the Clerk of Court. App. 274-281. The respondent filed a return dated December 4, 2012, requesting that a hearing be held in response to petitioner's PCR action. App. 282-287.

A PCR hearing was convened on May 6, 2013, at the Oconee County Courthouse before Judge R. Lawton McIntosh. App. 307-373. On July 23, 2013, Judge McIntosh issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel. App. 385-398.

Petitioner appealed Judge McIntosh's Order of Dismissal. This petition follows.

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[1] Petitioner was acquitted on the charge of discharging a firearm into a dwelling.

QUESTION I

The PCR judge erred in finding no ineffectiveness in trial counsel's failure to object to the trial judge's accomplice liability jury charge and the solicitor's accomplice liability closing argument where both offered the jury an impermissible alternate theory of liability that was unavailable in the case because the offenses charged against the petitioner differed from the offenses charged against the "co-defendant," which was recognized by the PCR judge's acknowledgement that this was a **novel issue regarding an interpretation of "accomplice liability predicated upon actual charges brought by the state and not on the underlying facts presented at trial."**

Four people (two males and two females) entered the McCall residence on the date in question. Only the men (petitioner and Shane Elliott) were charged and convicted based on the events that occurred inside the McCall residence. Petitioner was charged and convicted of two counts of armed robbery and his "co-defendant" Shane Elliott was charged and convicted of two counts of strong arm robbery.

At trial, Ryanne Nicole Smith testified that on the afternoon of July 23, 2009, she, Shane Elliott, and Maria Villegas were all riding in a vehicle driven by petitioner when they ended up at Nathan and Jason McCall's residence. All four of them went inside the residence. Smith stated that after they all went inside, Jeff found Nathan McCall and hit him on the head with a pistol and then asked for money. Next, petitioner found Jason McCall (Nathan McCall's brother) and pointed a gun at him and then took money. Apparently, petitioner confiscated a gun also from one of the McCall brothers. Afterwards, petitioner fired shots into the McCall residence as they departed. Tr. 40, l. 12 –p.48, l. 13.

Maria Villegas testified that petitioner pulled out a gun and walked up to Nathan McCall asking for money. Villegas stated that she didn't remember much thereafter because she walked out of the house. Tr. 119, l. 20 - -p. 26, l. 2.

Shane Elliott, who was also present at the scene, testified that petitioner walked up to Nathan McCall while armed with a pistol and hit him in the head with the pistol, and that he later went up to Jason McCall and asked for his (petitioner's) pistol back, and that soon thereafter they all fled. Elliott added that petitioner fired shots at the house as they were leaving. App. 127, l. 18 – p. 132, l. 10. Elliott stated that he was not in possession of a gun during these events. App. 135, l. 13-15. Indeed, Elliott was arrested in connection with the case and pled guilty to two counts of strong arm robbery. Tr. 144, l. lines 10-18.

Nathan McCall testified that on the day in question, petitioner entered his home with a pistol and demanded money from him. McCall stated that petitioner and hit him with the pistol and took his (McCall's) pistol. App. 56, l.1 – p. 58, l. 22. Jason McCall testified that he left the door open for petitioner to come in on that date, and that soon thereafter petitioner confronted him while holding a gun and asked for money. Jason McCall stated that he gave petitioner cash, and that shots were fired into the house as they (all four visitors) made their exit. App. 86, l. 2 – p. 90, l. 25.

Days later, petitioner was apprehended by police. Police Officer Scott Arnold took a statement from petitioner. Petitioner told police that they all went to the McCall residence, and that while there, he took 3½ grams of methamphetamine (and presumably did not take money) from Jason McCall and departed without discharging a firearm. Note that petitioner was acquitted on the charge of discharging a firearm into a dwelling. App. 188, l. 12 – 22.

Petitioner did not testify at trial and did not present witnesses in his defense, but clearly the case was premised upon petitioner being the one in possession of a gun. Hence, armed robbery

charges were lodged against petitioner, and a strong arm robbery charges were lodged against Elliott.

The solicitor's closing argument at trial regarding accomplice liability follows:

> Now, we know at least one of the subjects fired a round through the dwelling...and there was testimony from two of the witnesses, that the shot came from [petitioner]. There was nobody [that] said Shane Elliott fired, but no matter which one fired, the judge is also going to charge you a principle in law is the hand of one is the hand of all. That means if they both go into this house on a criminal enterprise, the stuff that happened in that house during the crime, they are both equally responsible for. The hand of one is the hand of all. So even is Shane Elliott didn't have a gun going in the house, but Jeff Webb did, and they all both participate in the robbery, even id there's only one gun... App 218, l. 5 – p. 219, l. 1.

At trial, the trial judge charged the jury as follows:

> Now, if a crime is committed by two or more people who are acting together in committing the crime, the act of one is that act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of his actions done in carrying out the common plan or purpose. If two or more people are together, acting together assisting each other in committing the offense, the act of one is the act of all, or as it's sometimes said, the hand of one is the hand of all. The state must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all....When a person does an act in the presence of and with the assistance of another, the act is done by both. If two or more people acting with a common plan or purpose are present at the commission of the crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. Tr. 247, l. 13 – p. 248, l. 19.

During the PCR hearing, petitioner testified that counsel erred in failing to object to the solicitor's accomplice liability argument and to the trial judge's accomplice liability charge because

Elliott was arrested, charged, and pled guilty to strong arm robbery charges only, and that as a result, Elliott's crimes should not have been imputed to petitioner. App. 324, l. 20 – p. 325, l. 25; App. 313, l. 15 – p. 315, l. 15. Petitioner reiterated that Elliott was charged with and convicted of strong arm robbery charges, but that he (petitioner) was charged with and convicted of two counts of armed robbery. App. 319, l. 23-25.

Trial counsel testified at the PCR hearing and explained that he was unhappy with the trial judge's accomplice liability charge since the "co-defendant (Elliott) "was not on trial at the same time" and because the charge was unfair. App. 344, l. 15 – p. 345, l. 10.

PCR counsel argued that the accomplice liability charge was improper because "they [tried] to impute the criminal act(s) of [Elliott] to [petitioner]" but that Elliott was not charged with the same offenses as the offenses charged against petitioner. App. 362, l. 19 –p. 363, l. 1.

The PCR judge ruled that the facts of the case clearly supported the accomplice liability jury charge and that counsel was not ineffective in failing to object to the same, but noted that **petitioner presented a "novel restrictive interpretation of accomplice liability predicated upon the actual charges brought by the state and not on the underlying facts presented at trial."** App. 393 - 394.

Accomplice liability is applicable if a person personally commits a crime or is present at the scene of the crime and intentionally or through a common design, aids, abets, or assists in the commission of that crime through some overt act. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010), citing to State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). However, in Barber v. State, 393 S.C. 232, 712 S.E. 2d 436 (2011), per a direct appeal review via White v. State, [2] the Court held that only in cases where there is uncertainty regarding an integral fact will an alternate theory of

[2] 263 S.C. 110, 208 S.E.2d 35 (1974).

liability based on accomplice liability be allowed and charged, and that speculation about the facts cannot support an accomplice liability charge where there is no uncertainty about an integral fact. In Barber, four perpetrators entered a house to rob a drug dealer and at some point one of the four perpetrators shot and killed said drug dealer. Three of the perpetrators testified that Barber was the gunman, but Barber, who did not testify at trial, produced evidence indicating that the drug dealer was not shot by him, but rather by another member of the group. Thusly, the question was which one of the conspirators was the shooter, and did Barber act in concert with the shooter. The Barber Court held that " the testimony [was] equivocal as to whether or not Barber was the only person armed with the type of gun the forensic experts say fired all the shots that night...[and therefore] the circuit court judge did not err in instructing the jury on "the hand of one, the hand of all" theory of accomplice liability. In other words, in Barber there was uncertainty regarding the identity of the shooter.

However, compare the case of Wilds v. State , ___ S.E.2d ___ 2014 WL 463053 (S.C. App), where the Court held that appellate counsel was ineffective in failing to raise on appeal the issue of the trial judge's error in charging accomplice liability in the case because there no evidence that existed indicating that anyone other than Wilds was the shooter because the only "evidence presented was that Wilds was the shooter." Wilds stopped walking and shot a citizen on the street while Wilds' two friends kept walking down the street and had no part in Wilds' decision to shoot and kill, although they (two friends) later received the money Wilds' recovered from the dead man's wallet. The Wilds Court held that although the jury might have had doubts about the two men who keep walking and **their liability**; nonetheless, it was error for the trial judge to inject an alternate theory of liability by charging accomplice liability on the ground that the jury may have believed some of the evidence and disbelieved the other evidence.

Similarly, the case at bar is related to Wilds to the extent that the majority of the evidence presented indicated that petitioner was in possession of a gun at the McCall residence. Therefore, since the majority of the evidence pointed to a near certainty that petitioner wielded a gun at the scene, then it was error for the judge to charge accomplice liability, which presented to the jury with an alternate theory of liability, i.e., that petitioner was guilty since he was acting in concert with Elliott who pled guilty to committing two counts of strong arm robbery, because ultimately this would at the very least ensure a verdicts of guilt on the lesser offenses of robbery against petitioner rather than acquittals. The charge in question improperly bootstrapped Elliott's strong arm robbery charges to petitioner when the two charges lodged against the two men were different. Therefore, the court erred in tying Elliott's criminal participation to petitioner and linking an alternate theory of liability not supported by the charges. This error was exacerbated by the fact that the solicitor laid the foundation in support of the trial judge's accomplice liability charge by arguing the same in her closing remarks. Hence, the jury received two accomplice liability inoculations.

Clearly, counsel erred in failing to object to the trial judge's accomplice liability charge and the solicitor's accomplice liability closing, which was tantamount to deficient representation at trial in violation of the Sixth Amendment's guarantee that a defendant must receive representation by competent counsel at trial. See Strickland v. Washington, 466 U.S. 668 (1984). Petitioner was prejudiced as a result, because but for counsel's error in this regard, there was a reasonable likelihood that petitioner's trial would have ended differently.

QUESTION II

Trial counsel erred in failing to object to the solicitor's closing remark that highlighted petitioner's failure to testify at trial because this deprived petitioner of the right to a fair trial.

During the PCR hearing, petitioner testified that since he did not testify at trial, then trial counsel erred in failing to object to the solicitor's closing statement that "he (petitioner) did it and that there was no evidence to the contrary. App. 315, l. 16 – p. 316, l. 18; App. 338, lines 6 – 12.

Trial counsel testified that the solicitor's remark constituted an impermissible comment on petitioner's right to remain silent, and that he admitted that he should have objected to this, but that " he missed that." App. 343, l. 11 – p. 344, l. 10; App 351 lines 16-20.

When a solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, then the statement is viewed as a comment on the defendant's failure to testify. State v. King, 349 S.C. 142, 561 S.E.2d 640 (2002); State v. Sweet, 342 S.C. 342, 563 S.E.2d 91 (Ct. App. 2000). In King, there was someone other than the defendant who heard an incriminating conversation in the case and could have translated what was meant when the defendant told a friend to get his s----, after which time the friend contacted police and drug were found in the location in question. Thus, the solicitor's comment that this friend's testimony (exposing the defendant's drug related remark which led to the drug charge) was "uncontradicted" did not constitute a comment on the defendant's right to testify because there was a third person on the three-way call was available to testify if necessary. In Sweet, however, the Court reversed when the solicitor stated that only the defendant could rebut the testimony of the two accomplices who incriminated him.

Similarly, in the case at bar, everyone (save petitioner) in the house, including the victims, stated that petitioner was armed at the scene. Thus, petitioner was the only person who could have

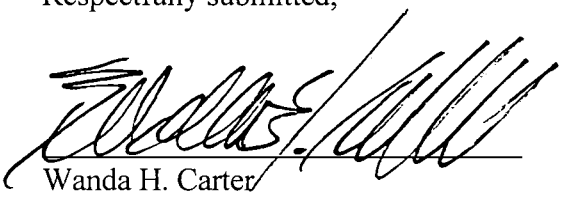
contradicted all five people who stated he committed armed robbery. Therefore, the solicitor's remarks in the case at bar, i.e., that petitioner did it and there was no evidence to the contrary, did indeed constitute a direct comment on petitioner's failure to testify, which in turn was a comment on his right to remain silent.

As a rule, a solicitor cannot comment directly or indirectly upon a defendant's failure to testify at trial. King v. State, supra and Gill v. State, 346 S.C. 209, 552 S.E. 2d 26 (2001), citing to Doyle v. Ohio, 426 U.S. 610 (1976), where the Court held that an accused has a right to remain silent and that the exercise of that right cannot be used against him. In order to show prejudice there must be proof that such error was not harmless. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Per Pickens, in order for a Doyle error to be harmless, the record must establish that the reference to the defendant's right to silence occurred once, and that the solicitor did not tie the silence to the defendant's exculpatory story, and the exculpatory story was implausible, and that guilt was overwhelming. In the case at bar, the solicitor made yet another reference during her closing argument regarding petitioner's failure to testify when she admitted that the state's witnesses were drunk at the scene and not credible witnesses, and that their statements and testimony varied, but then asked "why does nobody want to come up here and testify." App 219, lines 20-21; App. 216, lines 2-9; App. 213, lines 4-8. Also, the solicitor added at closing that petitioner's statement that he did nothing other than get methamphetamine while at the McCall residence "didn't add up" and was thus implausible, but to the contrary this was plausible. App. 220, l. 11- 25. Counsel's error in failing to object to the solicitor's comment on petitioner's right to silence violated his Sixth amendment right to effective assistance of counsel at trial. See Strickland v. Washington, supra. Petitioner was prejudiced because this error affected the results of his trial.

CONCLUSION

Based on the foregoing arguments, petitioner requests that this Court grant the petition and allow full briefing on the issued raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2014.

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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 Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Mr. Jeff A. Webb #214186 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of April, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of April, 2014.

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.