STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

KASEEM STEPHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002331

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by finding trial counsel was not ineffective for failing to advise Petitioner of his fundamental right to testify and that Petitioner freely and voluntarily waived his right to testify where Petitioner testified that trial counsel made the decision he would not testify and where Petitioner suffered prejudice since his testimony would have established an alibi defense?

STATEMENT

A Charleston County Grand Jury indicted Petitioner at the August 2008 term General Sessions for murder. App. 459-460. His case was called to trial on March 16, 2009 before the Honorable R. Markley Dennis, Jr., and a jury. Assistant Solicitors Peter McCoy and Kevin Hales represented the state, and Jason King and Reece Stidham represented Petitioner. App. 1. At the conclusion of the trial on March 17, 2009, the jury found Petitioner guilty. App. 370, ll. 8-18. He was sentenced by Judge Dennis to forty years imprisonment. App. 389, ll. 15-17.

The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (Ct. App. 2012).

On October 30, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 391-397. The state filed a return to this application on April 18, 2013. App. 398-401. The matter proceeded to an evidentiary hearing on May 22, 2013 before the Honorable Deadre L. Jefferson. App. 402. Assistant Attorney General Ashleigh R. Wilson represented the state, and William L. Runyon, Jr. represented Petitioner. App. 402. By order dated October 22, 2013, Judge Jefferson denied Petitioner relief. App. 447-458.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred by finding trial counsel was not ineffective for failing to advise Petitioner of his fundamental right to testify and that Petitioner freely and voluntarily waived his right to testify where Petitioner testified that trial counsel made the decision he would not testify and where Petitioner suffered prejudice since his testimony would have established an alibi defense.

Facts at Trial

Jamol Greene testified that on the afternoon of March 27, 2007 he was in the Trailwood Mobile Home Park located in North Charleston. Greene claimed he was driving his mother's Ford Explorer -- not his own Cutlass which was linked to the shooting -- when he stopped at the corner of Ree and Lee Streets.[1] App. 107, ll. 9 – 108, l. 3. He testified that he stopped there to talk to his friend, Verndell, but claimed he never got out of his vehicle. App. 108, ll. 4-15; App. 109, ll. 21-22.

Greene remembered that the decedent, Sheldon Frasier, then drove up in a blue Pontiac and parked beside him. The decedent was with his girlfriend, Kimberly Bates. Greene testified that the decedent got out of his car and began talking to Verndell. App. 109, ll. 1-10.

After the decedent and Verndell were talking for about five minutes, Greene claimed Petitioner arrived in the burgundy Cutlass owned by Greene's mother that Greene drove. App. 110, l. 10 – 111, l. 3. There was other evidence that Petitioner did "detail work" on cars in the community, and Greene said Petitioner was driving the Cutlass that day because he was cleaning it. App. 114, l. 17 – 115, l. 10.

Greene claimed Petitioner walked up to the decedent and asked him: "Do you remember when you pulled the gun on me?" App. 111, ll. 16-24. Greene said an argument then ensued

[1] The Cutlass was apparently registered to the mother, but Greene considered it his car. App. 119, ll. 10 – 17.

between Petitioner and the decedent. Greene maintained the decedent tried to run, but that Petitioner shot him as he ran away. App. 112, ll. 5-25.

Greene testified that Petitioner "sped off" in the Cutlass after he shot the decedent. App. 114, ll. 5-16. Greene admitted he left the area after the shooting and went to James Island. Greene claimed he left because he was scared. He never contacted the police. Instead, the police had to come to his North Charleston house looking for him. Greene eventually made arrangements through his attorney to come forward and give a statement to the police. App. 115, l. 19 – 117, l. 5. In his statement, Greene blamed Petitioner for the shooting. However, Petitioner was already listed in the newspaper as the suspected shooter at the time. App. 121, l. 15 – 123, l. 15.

Charles Moore, Greene's brother, testified next. Moore also claimed Petitioner was driving Greene's Cutlass on the afternoon of the shooting. App. 126, l. 13 – 128, l. 14.

The significance of the Cutlass was that the decedent's girlfriend, Bates, identified the Cutlass as being the vehicle driven by the shooter. App. 212, l. 24 – 213, l. 9. The Cutlass was found parked down the street following the shooting, and Petitioner was developed as a suspect.[2] App. 167, l. 3 – 168, l. 2; App. 214, l. 21 – 216, l. 18.

The decedent's girlfriend was twenty-seven-year-old Kimberly Bates. She testified that she was riding with the decedent and the two stopped outside a residence in the Trailwood Mobile Home Park. She explained that the decedent got out of the car and began talking with several men that were outside while she stayed in the car. Bates said, "All of a sudden I seen [the decedent]

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[2] There was no scientific evidence linking Petitioner to the shooting, but the state tried to make much of the fact that Petitioner's business card "where he cleaned vehicles" was found in the Cutlass. App. 168, l. 24 – 169, l. 13; App. 181, l. 16 – 182, l. 4; App. 150, l. 5 – 151, l. 2; App. 160, ll. 2-20. The pathologist testified that the decedent was shot in the back of the neck and that his carotid artery, which was ripped by the bullet, was reattached during surgery. However, the decedent developed a blood clot and died days later on March 31, 2007. App. 199, l. 11 – 204, l. 19.

coming past the car with another [person] following behind him, shooting a gun at him." App. 206, l. 21 – 208, l. 16. Bates identified Petitioner as the man chasing the decedent. She said she ran up to Petitioner to try to stop him from shooting at the decedent again, but she maintained Petitioner started to point the gun at her and she ran and hid in the car. App. 209. l. 7 – 212, l. 18. Once she got back into the car, she claimed everyone drove off. App. 212, l. 17 – 213, l. 5.

Bates told the police the shooter was driving a burgundy Cutlass. App. 212, l. 24 – 213, l. 9. Bates said she could not identify the shooter from the photographic lineup showed to her at the hospital, but she identified Petitioner as the shooter from a second photographic array shown to her the next day. App. 216, l. 19 – 220, l. 20.

Psychologist Dr. Lori Van Wallendael testified as an expert for the defense. App. 232, l. 5 – 237, l. 21. The essence of her expert testimony was that people under stress like Bates tended to make unreliable eyewitness identifications. App. 238, l. 10 – 255, l. 17.

PCR Hearing

Trial counsel, Jason King, testified that he is an assistant public defender and was appointed to represent Petitioner. App. 407, ll. 13-15; App. 408, ll. 8-10. King testified that his strategy at trial was to argue that the decedent's fiancée, who was an eyewitness and had identified Petitioner as the shooter, was mistaken in her identification and that Jamol Greene, another eyewitness, was "just pinning it on Mr. Stephens [Petitioner]." App. 410, l. 11 – 411, l. 16.

King explained that Petitioner told him "he had an alibi defense, so I did investigate that. He said that he was at his mother's funeral in New York. I looked at that, I got a copy of the funeral program. His mother did pass away and there was a funeral ten days before the shooting. So I investigated that alibi defense but [I] found nothing to support it. I talked to several witnesses, people in New York, [people]/witnesses [sic] that he had given me; but I had no witness that would

put him in New York at the time of the shooting. Some of the witnesses even put him here in Charleston at the time of the shooting. So while I was given an alibi defense, I had nothing to put that up. So I didn't go with that." App. 413, ll. 1-17.

King testified that Petitioner did not testify. App. 414, ll. 15-16. He said, "We talked with Mr. Stephens about his testimony, spent some time going over some testimony with him, some practice. I didn't think that it went very well . . . I mean, if I thought that he had a chance of getting up there, I might have advised him to take the stand. But from my working with him, I didn't feel that he would help the case at all. And without anything to back up the alibi - - so I advised him not to take the stand." App. 417, ll. 4-22. However, King maintained that it was ultimately Petitioner's decision not to testify and that "I gave him my advice but I didn't make the decision for him." App. 417, l. 23 – 418, l. 4.

Petitioner testified that he did not testify at trial. He explained that it was more trial counsel's decision than it was his decision. He maintained that trial counsel ultimately made the decision that he would not testify. App. 425, l. 24 – 426, l. 14. Petitioner said, "Jason King told me that I was guilty from the get-go. He told me that because of my record that it wouldn't be good for me to take the stand." App. 429, l. 25 – 430, l. 3. Petitioner again stated that it was "Jason King's" decision that he would not take the stand. App. 430, ll. 4-7.

Petitioner testified that he wanted his defense at trial to be an alibi defense. He said he was in New York at the time of the shooting and was not in Charleston. He explained that his "mom passed away and [he] had to take care of her estate." App. 427, ll. 12-25.

Order of Dismissal

The PCR court found that "the record reflects [Petitioner] freely and voluntarily waived his right to testify at trial." App. 455. The court noted that Petitioner was advised by the trial judge "it

was his decision whether or not to testify" and that Petitioner "confirmed he was both comfortable with his decision not to testify and satisfied with his attorney's advice on such matter." App. 455-456. The court ultimately found the allegation that Petitioner did not freely and voluntarily waive his right to testify without merit. App. 456.

Discussion

"The right of a criminally accused to testify or not to testify is a fundamental right." State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. at 241, 741 S.E.2d at 702 (quoting Rock, 483 U.S. at 53) (internal quotation marks omitted). "It is one of the rights that are essential to due process of law in a fair adversary process." Rivera, 402 S.C. at 242, 741 S.E.2d at 703 (quoting Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)) (internal quotation marks omitted).

"A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). A waiver of the constitutional right to testify must be knowing and voluntary. See State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Trial counsel was ineffective by failing to advise Petitioner of his absolute right to testify in his own defense and by failing to ensure that Petitioner freely and voluntarily waived this fundamental right. In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); See also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d

813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. While trial counsel testified that he discussed with Petitioner why he should not testify, he failed to advise Petitioner that he had an absolute right to testify. Based on his testimony, it appears trial counsel was convinced Petitioner would not be a good witness and "would not help the case at all." Because of this opinion, trial counsel advised Petitioner not to testify. However, he failed to ensure that Petitioner's decision not to testify was his own decision and was made knowingly and voluntarily.

In the Order of Dismissal, the PCR court focused almost entirely on the fact that Petitioner was advised on the record by the trial court of his right to testify and subsequently told the judge that he did not wish to testify. However, "[a]n on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). Based on all the evidence, it was never established that Petitioner knowingly and voluntarily waived his right to testify.

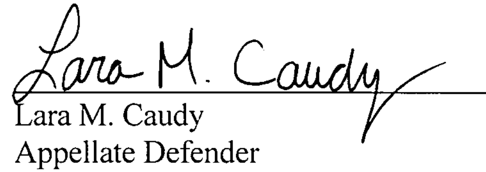
Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to properly advise Petitioner of his constitutional right to testify likely led Petitioner to make a decision without sufficient knowledge or understanding of this fundamental right. Therefore, Petitioner did not knowingly and voluntarily waive his right to testify. Ultimately, this prevented the jury from hearing Petitioner's testimony. If Petitioner would have testified at trial, his testimony would have revealed that he was in New York at the time of the shooting, thereby establishing an alibi defense.

Therefore, this Court should find trial counsel ineffective for failing to ensure Petitioner freely and voluntarily waived his right to testify and that Petitioner suffered prejudice as a result.

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 3rd day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

KASEEM STEPHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002331

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kaseem Stephens states:

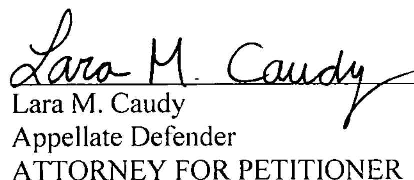
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on May 22, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for Kaseem Stephens.

Respectfully submitted,



Lara M. Caudy
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STATE OF SOUTH CAROLINA
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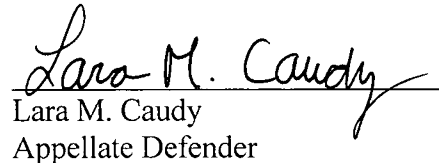
CERTIFICATE OF SERVICE

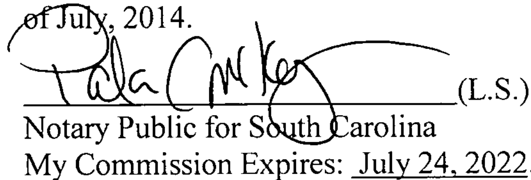
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kaseem Stephens, #333714, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of July, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of July, 2014.


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